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## Preface

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## Preface

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The role of John Austin (1790–1859) in the founding of analytical jurisprudence is unquestionable. Among his most remarkable contributions, mention should be made of his particular conception of jurisprudence (“general jurisprudence”), the command theory of law, the definition of positive law as the command of the sovereign, his peculiar idea of sovereignty, the sharp distinction between law and morality, the harsh criticism of the concept of natural law and rights, his particular conception of liberty, his strong commitment to codification or rule by law, and the various classifications of the law, most notably the distinction between the law of things and the law of persons, and primary and secondary rights and duties.

After a century and a half, time has come to assess his legacy. This book is intended to fill a void in the existing literature. Work on Austin is, in fact, surprisingly scant for one of the great names of both jurisprudence and utilitarian ethics. Even though Austin appears in most textbooks and in a great many articles, and his theory is still a crucial point of reference in the classroom, there are few books presenting Austin’s legal and ethical thinking in relation to the different perspectives within legal theory.

This is the first-ever collected volume on Austin, assembling 15 papers presented at the 150th Anniversary Conference *John Austin and His Legacy*, organised by Michael Freeman at Austin’s home institution, University College London, 16–17 December 2009. The chapters in this book correspond to papers given at the conference in the order they were originally presented. Only minor changes, such as titles, have been made so as to reflect the spirit of the meeting: “this 150th Anniversary Conference was the greatest assemblage of talent devoted to the jurisprudence of John Austin since John Stuart Mill attended his lectures” as James Murphy wrote to the editors. Scholars coming from different traditions of thought with diverse outlooks singled out, presented and discussed John Austin’s legacy in jurisprudence. So this collection reflects the various currents within the broad set of post-positivistic, constitutionalist, and normativity-focused theories today dominating the scene in legal theory, as well as realist approaches to law. By harvesting the different sensibilities of those contributing to this collection, the aim is to offer a nuanced, vibrant and



108 richly diverse picture of John Austin, on the backdrop of the major trends in  
109 jurisprudence – a difficult task for any single scholar to accomplish.

110 Besides giving interesting insights to the historical origins of jurisprudence, the  
111 idea is to survey the wider issue of theoretical disagreement as it persists within  
112 contemporary legal theory, as well as to assess Austin's problematic relation to legal  
113 reasoning and provide some topical comparative analyses with other major move-  
114 ments in legal theory, such as positivism (including normative positivism) and legal  
115 realism. The volume applies multiple perspectives, reflecting Austin's different  
116 interests – stretching from moral theory to theory of law and state, from Roman law  
117 to constitutional law – and offers a comparative approach focusing on Austin's legacy  
118 in the light of the contemporary debate. This approach makes his jurisprudence  
119 accessible to both students and scholars as it sheds new light on some of the central  
120 issues of practical reasoning: the relation between law and morals, the nature of  
121 legal systems, the function of effectiveness, the value-free character of legal theory,  
122 the connection between normative and factual inquiries in the law, the role of power,  
123 the character of obedience and the notion of duty.

124 A focal point is naturally the theory of sovereignty and power. Pavlos Eleftheriadis  
125 (Mansfield College, Oxford) develops an innovative interpretation of two rival  
126 theories of sovereignty in Austin, namely sovereignty for a single person and for a  
127 "determinate body." Detailed assessments of the key concept of sovereignty permit  
128 testing of Austin's conclusion according to which sovereignty lies, ultimately, with  
129 the electors and discussion of the public and intelligible character of sovereignty.  
130 David Dyzenhaus (University of Toronto) engages in a dialogue with Eleftheriadis  
131 on the Austinian conception of sovereignty as the unfettered discretion of the  
132 supreme political authority to make judgements about the general welfare. A series  
133 of parallels with great names of the positivist tradition are drawn here, where the  
134 stakes are high indeed: the issue calls on constitutionalist perspectives on power and  
135 ultimately on the nature of legitimate authority.

136 The positivist methodology is another focal point. Andrew Halpin (National  
137 University of Singapore) and Brian Bix (University of Minnesota) make significant  
138 contributions to the understanding of the method of general jurisprudence in the  
139 light of the current debates. By confronting the ability of some contemporary  
140 accounts of the nature of law, such as Joseph Raz's exclusive legal positivism and  
141 Ronald Dworkin's interpretivism, the issue is raised of when deviations from  
142 conventional understandings of legal practice constitute grounds for dismissing a  
143 theoretical account and to what extent Austin's theory of law might offer an account  
144 that better fits the facts than conventionally assumed. This is also the occasion for  
145 stressing that Austin was adamant about the fundamental importance of linking  
146 theoretical inquiry to practical concerns, and in times of global changes to law,  
147 moving contemporary legal theory ahead from a condition inherited from Austin  
148 might require us to pay greater attention to what Austin did leave us.

149 "The ties" between law as it is and law as it ought to be, at the societal and  
150 normative levels, is further explored by Maria Isabel Turégano Mansilla (Universidad  
151 Castilla-La Mancha) who deals with the separation thesis and the problem of the  
152 connection between the ethical and the legal dimensions of Austin's work; and by

Michael Rodney (London South Bank University) who discusses the key notion of habit in Austin so as to capture the often overlooked point that the diachronic existence of any social structure, including a legal system, requires regularised social practices which are constituted by the repeated activities of those that go to make up such structures.

Moreover, Michael Lobban (Queen Mary, University of London) explores the lasting influence of German Pandectism on Austin's positivism and its complications for the command theory of law: none of the rights Austin discussed – neither the primary right protected nor the secondary right to have one's wrongs redressed by a court – derive from a command. This entails questions such as whether judges are best said to be creating or recognising rights and if there can be such a thing as customary law. Taking an even longer perspective into account, Andrew Lewis (UCL) accounts for the Austinian view on Roman Law, regarded as the essence of developed legal thinking. Contrarily to the idea that reference to Roman law in Austin locates him in a bygone age – following the spirit in which the study of Austin's work is too often approached nowadays – Lewis shows how subtle Austin's understanding of Roman Law actually is; firmly grounded on the distinction between the pristine purity of classical Roman law on one hand and on the other the Roman heritage in the civil law tradition prevailing in much European law.

Wilfrid Rumble (Vassar College) takes on the puzzling question of why, after 1832, Austin published nothing that focused on jurisprudence. Was it really, as some suggest, because he developed an entirely different legal theory? If this is so, it would dramatically modify our understanding of his jurisprudence: the alleged changes would require us to revise not only our understanding of Austin's legal philosophy, but our evaluation of it. The riddle of whether Austin remained an Austinian is addressed with the great accuracy that only the very knowledgeable scholar masters.

Yet, it is also important to remember that Austin was concerned with much more than jurisprudence: stability of social interaction does not depend exclusively on external regularities of behaviour but on a common attachment to normative authority. So the emphasis on ethics is topical because his meta-ethical insights as well as his rule-utilitarianism are likely to find renewed attention after the recent re-edition of Bentham's *On Laws in General* that has spurred interest in Austin's "master" and the early positivist movement in the English-speaking world, notably because of the latter's prominent place in the field today. One of the overarching claims of the present collection is that Austin's positivism is, as Schauer puts it, "entitled to at least co-equal claims on the positivist tradition as the work of H. L. A. Hart."

This is why the collection focuses on close-up comparative analyses of the most important trends in legal theory: Frederick Schauer (Virginia University) gives an historical and philosophical account of Austin's legacy within mainstream positivism; Lars Vinx (Bilkent University) examines his legacy in relation to normativism, especially in the version of Kelsen; Patricia Mindus (Uppsala) and Jes Bjarup (Stockholm) offer differing views of Austin's reception in Scandinavian Legal Realism, where his theories cemented a new path different from the positivists' main road, whereas James Bernard Murphy (Dartmouth College) offers a well-argued



198 account of Austin's debt towards the natural law tradition, in particular in relation to  
199 the notion of divine law. To complete the picture, a comparative study of the great  
200 contemporaries that influenced Austin is included: Philip Schofield (UCL) examines  
201 the relation between Austin and Mill, and Bentham.

202 This range of interests shows why a collection on Austin is timely. As Dyzenhaus  
203 stresses, attention to Austin helps us to grasp significant continuities between his  
204 theory and that of many contemporary legal scholars. The historical perspective on  
205 philosophy of law enables us to appreciate the wealth of implications of the basic  
206 divide in legal theory, i.e. between those, on one hand, who focus on the distinction  
207 between the rule of law from the rule of men by stigmatising the arbitrary character  
208 that law may assume when it no longer is answerable to the ideal of legality and  
209 those, on the other hand, who perceive the rule of law in continuity with the reliance  
210 on the neutrality of legal science and its rule by law tradition where the nature of  
211 modern law raises questions of efficacious transposition into practice of choices  
212 made by policymakers and lawmakers.

213 Finally, the usefulness of gathering work on Austin, making arguments readily  
214 available and easier to overview, was made possible by the contribution and work of  
215 many. Some papers are reprinted here on authorisation of the prestigious journals  
216 that first published them: Chap. 2 by Andrew Halpin, entitled *Austin's Methodology?*  
217 *His Bequest to Jurisprudence*, first appeared on the *Cambridge Law Journal* in 2011  
218 (vol. 70); we would like to thank Linda Nicol and the Cambridge University Press  
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221 to republish the papers that appeared in *Canadian Journal of Law and Jurisprudence*,  
222 volume XXIV, No. 2 in July 2011, that correspond to Chap. 8, entitled *Austin and*  
223 *the Electors* by Pavlos Eleftheriadis; Chap. 11, entitled *Austin, Hobbes, and Dicey*  
224 by David Dyzenhaus; and Chap. 14, entitled *Positivism before Hart* by Frederick  
225 Schauer. *The Canadian Journal of Law and Jurisprudence* also hosted different  
226 parts and earlier versions of Chaps. 1 and 4, respectively Brian Bix on *John Austin*  
227 *and Constructing Theories of Law* and Lars Vinx on *Austin, Kelsen, and the Model*  
228 *of Sovereignty: Notes on the History of Modern Legal Positivism*. This is also the  
229 occasion for thanking those who updated and revised their texts. We also thank Neil  
230 Olivier at Springer for his perseverance in getting this volume published.

231 ~~UCL Law School, UK~~

232 ~~Uppsala University, Sweden~~

Michael Freeman

Patricia Mindus

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# Chapter 1

## John Austin and Constructing Theories of Law\*

Brian H. Bix

### 1.1 Introduction

One of the standard criticisms of John Austin's work is that his portrayal of law, as essentially the command of a sovereign to its subjects,<sup>1</sup> does not fit well with the way law is practiced in many or most contemporary legal systems or the way that it is perceived by lawyers, judges, and citizens who are participants in those systems. The argument continues: that since the theory "fails to fit the facts," Austin's theory must be rejected in favour of later theories that have better fit.

This seems like a standard move in theory construction. Where the objective is to describe or explain some practice, any conflict between the theory and the practice being described counts strongly against the proposed theory, and we should search for an alternative theory that fits the practice better.

The importance to jurisprudential theory-construction of fidelity to participants' understanding has been reinforced by the move in English-language legal theory towards a hermeneutic approach to legal theory (as in the "internal point of view" introduced by Herbert L. A. Hart,<sup>2</sup> and accepted by theorists as far apart

---

\* An earlier version of this paper was presented at the University College London Conference, "John Austin 150th Anniversary" and a different version of portions of the paper was published in (2011) 24 *The Canadian Journal of Law and Jurisprudence* 431–440. I am grateful for the comments of Andrew Halpin, the other participants at the University College London Conference, and Brian Tamanaha.

<sup>1</sup> John Austin, *The Province of Jurisprudence Determined* ed. by Wilfrid E. Rumble (Cambridge: Cambridge University Press, 1995) (first published, 1832); John Austin, *Lectures on Jurisprudence, or The Philosophy of Positive Law* ed. by Robert Campbell (4th edition, rev., London: John Murray, 1873) [Bristol: Thoemmes Press reprint, 2002], two vols.

<sup>2</sup> Herbert L. A. Hart, *The Concept of Law* (rev. ed., Oxford: Clarendon Press, 1994) at 56–57, 84–91.

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19 methodologically as John Finnis and Joseph Raz<sup>3</sup>). In very rough terms, this  
20 approach argued (or, at times, merely assumed) that theories of law would be better  
21 to the extent that they accounted for the perspective of those citizens who viewed  
22 the law as giving them reasons for action. This approach to legal theory, in turn,  
23 reflects the general “hermeneutic” or “*Verstehen*” approach to the social sciences: a  
24 view that knowledge of social institutions is distinctly different from knowledge in the  
25 physical sciences, and that a primary focus of theorizing is and should be awareness  
26 of the motivations and purposes of participants, emphasizing participants’ under-  
27 standing, not merely their behaviour.

28 For many influential modern approaches to the nature of law, including Joseph  
29 Raz’s exclusive legal positivism and Ronald Dworkin’s interpretivism, while they  
30 criticize the lack of fit of theories like Austin’s, those theories themselves unapolo-  
31 getically offer characterizations of legal practice that deviate in significant ways  
32 from the way most people practice or perceive law. Thus, at least at first glance, it  
33 appears that many contemporary legal theorists wish to have it both ways: they use  
34 the deviations from conventional understandings as grounds for dismissing some  
35 theories by other scholars, but forgive or overlook comparable deviations in their  
36 own theories.

37 This chapter will begin to explore what general principles can be learned, or  
38 developed, regarding when or to what extent deviation from the way law is practiced  
39 and perceived is appropriate in a theory of the nature of law. Additionally, the chapter  
40 will also consider whether, in light of the proper approach to fit and mistake in  
41 theory-construction, Austin’s theory of law might be a more viable alternative than  
42 is conventionally assumed.

## 43 1.2 Deviations and Mistakes

44 Joseph Raz writes:

45 John Austin thought that, necessarily, the legal institutions of every legal system are not  
46 subject to – that is, do not recognize – the jurisdiction of legal institutions outside their  
47 system over them. (...) Kelsen believed that necessarily constitutional continuity is both  
48 necessary and sufficient for the identity of a legal system. We know that both claims are  
49 false. The countries of the European Union recognize, and for a time the independent coun-  
50 tries of the British Union recognize, the jurisdiction of outside legal institutions over them,  
51 thus refuting Austin’s theory. And the law of most countries provides counterexamples to  
52 Kelsen’s claim. I mention these examples not to illustrate that legal philosophers can make  
53 mistakes, but to point to the susceptibility of philosophy to the winds of time. So far as I  
54 know, Austin’s and Kelsen’s failures were not made good. That is, no successful alternative  
55 explanations were offered.<sup>4</sup>

<sup>3</sup> John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) at 3–18; Joseph Raz, *Practical Reason and Norms* (Princeton: Princeton University Press, 1990) at 170–177.

<sup>4</sup> Joseph Raz, “Two Views of the Nature of the Theory of Law: A Partial Comparison” (1998) 4 *Legal Theory* 249 at 258 (footnotes omitted).



In a sense, this sort of criticism of Austin, and of Kelsen, is, within the jurisprudential literature,<sup>5</sup> perfectly common-place. Both theorists are presented as having interesting theories, but ultimately ones that are deeply flawed. In recent years, if scholars and students are familiar with Austin's work at all, it tends to be through H. L. A. Hart's use of Austin's work as a stepping stone to his own approach: the way Hart used purported weaknesses in Austin's command theory to justify Hart's own quite different form of legal positivism.<sup>6</sup>

Hart offered a series of criticisms of Austin's theory that are often now taken as proven accusations, with little attention given to potential defences of the theory. Hart's criticisms included: (1) that, contrary to Austin's theory, law contains much greater variety than is presented by a theory that equates law (only) with commands; (2) that Austin's theory cannot distinguish a legitimate legal system from the rule of gangsters or terrorists; (3) that theories that equate law with the command of a sovereign cannot account for the legal status of custom, and may also have trouble accounting for judicial legislation; and (4) that many communities do not have anything that would count as a "sovereign" in the sense used by Austin, a person or institution that has no limits or constraints. In fact, Austin noted many of these objections in his own works, and offered responses,<sup>7</sup> but these responses (some inevitably more substantial than others) have been largely forgotten in the rush to place Austin in his role as "the sincere but limited theorist whose faults were corrected by later and wiser writers."

This is not the place to give any final reckoning to the individual criticisms of Austin's work, but to consider the general sort of criticism raised. In particular, what I find intriguing about Raz's quoted criticism of Austin and Kelsen, is that the author of the criticism himself offers claims about law that other theorists and observers might similarly characterize as subject to "counter-examples," or as simply "mistaken" or "false."

Raz has famously argued for what others have labelled "exclusive legal positivism," a view that holds that moral evaluation can never play a role in determining what the law is (though it can play a role in determining what the law *should be*). When critics argue that there are clear contrary examples – moral standards in constitutional provisions or the use of moral reasoning in determining the content of common law legal norms – Raz denies that these are in fact refutations, or even counter-examples, to his theory. In the face of purported counter-examples, Raz notes that the judges'

<sup>5</sup> Here, as elsewhere in this paper, the reference is to the English-language jurisprudence literature. I am well aware that the traditions and discussions in other jurisprudential literatures are quite different (starting from the fact that, in many other countries, Austin, along with Hart and Raz, may be relatively unknown, while more emphasis is given to Kelsen's work).

<sup>6</sup> Herbert L. A. Hart, "Positivism and the Separation of Law and Morals" (1958) 71 *Harv. L. Rev.* 593 at 594–606; Hart, *The Concept of Law*, *supra* note 2 at 18–78; see also Scott J. Shapiro, *Legality* (Cambridge, MA: Harvard University Press, 2011) at 51–78.

<sup>7</sup> For example, Austin offers some detailed responses to possible objections to his claim that all societies have an unlimited sovereign, in Austin, *Province*, *supra* note 1 at Lecture VI, 190–242.

90 characterizations of what they are doing in opinions are often the result merely of  
91 conventions of presentation, or slightly mis-leading labels used so as not to provoke  
92 those naively attached to certain preconceptions (*e.g.*, that judges do not legislate).<sup>8</sup>

93 However, one would think that comparable arguments could be offered on behalf  
94 of Austin (and Kelsen, for that matter): arguing that whatever lack of fit there appears  
95 to be between their theories and current practices and perceptions would be removed  
96 or minimized by careful re-characterizations. Yet, for some reason, that move is  
97 rarely made by those commentators who are (too) quick to dismiss these theories.

### 98 1.3 Hart and Errors

99 And it is not just the rejected legal theorists of prior eras who must face accusations  
100 of lack of fit between theory and practice. Such claims reach even more established  
101 theorists.

102 The usual narrative of analytical jurisprudence, at least as given in most English  
103 and American university courses and in countless books and articles, is that John  
104 Austin has the merit of being the first, or one of the first, legal positivists, but that  
105 his theory was deeply flawed, flaws pointed out most clearly by H. L. A. Hart,  
106 whose own work set the standard for modern theories of law. However, though  
107 Hart's work is treated, in this narrative, as significantly superior to Austin's, and as  
108 the groundwork of all of merit in what has come since, there are occasional refer-  
109 ences to possible mistakes.

110 Some of the alleged errors are not relevant for our purposes, *e.g.*, because they  
111 relate to propositions that are tangential to Hart's theory of law; they can be aban-  
112 doned without affecting the basic structure and basic claims of the theory (*e.g.*,  
113 regarding the tenability of Hart's practice theory of rules<sup>9</sup>). However, other claimed  
114 errors in Hart's work cannot be so easily shrugged off: *e.g.*, as to whether legal  
115 systems should be equated with the union of primary and secondary rules, whether  
116 every legal system has one (and only one) rule of recognition, and whether law is  
117 mostly a matter of rules.<sup>10</sup>

118 As regards the union of primary and secondary rules, Simon Roberts argued that  
119 this criterion for the designation "legal system" (or "*non-primitive* legal system")  
120 improperly excluded many communities with more informal dispute-resolution and

<sup>8</sup> See, *e.g.*, Joseph Raz, *Ethics in the Public Domain* (Oxford: Oxford University Press, 1994) at 210–21; Joseph Raz, *Between Authority and Interpretation* (Oxford: Oxford University Press, 2009) at 190–202.

<sup>9</sup> Of which both Dworkin and Raz have given effective rebuttals. See Raz, *Practical Reason and Norms*, *supra* note 3 at 50–58; Ronald Dworkin, *Taking Rights Seriously* (rev. ed., Cambridge, MA: Harvard University Press, 1978) at 48–58.

<sup>10</sup> See, *e.g.*, Joseph Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979) at 95–96; Dworkin, *Taking Rights Seriously*, *supra* note 9 at 14–130.



norm-creation systems.<sup>11</sup> To which, one might answer, on Hart's behalf, that the mere fact that under some definition of law, or set of criteria for law, not all communities would be said to have law (or to have law in its fullest sense) is not, by itself, a reason to reject that definition or set of criteria.<sup>12</sup>

More central, perhaps, are two other criticisms. Under Hart's approach, all legal systems (at least all *sophisticated* legal systems) have a rule of recognition, which sets the criteria by which one determines which norms are part of that legal system. The rule of recognition is the highest (or, to change the metaphor, the most basic) norm in the chain of justification and authorization within the legal system. And, more implied than either asserted or argued for, each legal system has only one such rule of recognition. Raz has argued that there is no reason to assume that this will in fact be the case; that legal systems could well have two (or more) rules of recognition.<sup>13</sup> And Dworkin has argued forcefully that legal systems have principles as well as rules, legal standards that cannot be correlated with the sort of content-neutral "pedigree" criteria associated with a Hartian rule of recognition.<sup>14</sup> These claims of error cannot be brushed aside as easily as Roberts', and the arguments for and against have created a substantial literature, to which this article cannot do justice.<sup>15</sup>

#### 1.4 Trade-Offs

One point I hoped to make by this too-quick tour of major legal theorists and their critics is that accusations that theories deviate from practices and perceptions are widespread, and by no means the end of the discussion. Perhaps, it would be better if a theory matched perfectly participants' perceptions of a practice, but it is acceptable if it does not, as long as there is some benefit one gets in return. More to the point, perhaps, a perfect match between theories on one side, and practices and perceptions on the other, is not to be expected.

<sup>11</sup> See Simon Roberts, *Order and Dispute* (Harmondsworth, England: Penguin, 1979) at 23–25.

<sup>12</sup> See Brian H. Bix, *Jurisprudence: Theory and Context* (5th ed., London: Sweet & Maxwell, 2009) at 23–24.

<sup>13</sup> Joseph Raz, *The Concept of a Legal System* (2nd ed., Oxford: Clarendon Press, 1980) at 197–200.

<sup>14</sup> Dworkin, *Taking Rights Seriously*, *supra* note 9 at 14–45.

<sup>15</sup> One might note in passing a couple of possible lines of response: first, that for Hart, as for Kelsen before him, the notion of a single rule of recognition (for Kelsen, the single *Grundnorm* or "Basic Norm" – e.g., Hans Kelsen, *Introduction to the Problems of Legal Theory* trans. by Bonnie Litschewski Paulson and Stanley L. Paulson (Oxford: Oxford University Press, 1992) at 55–65 – is more of an assumption, by legal officials and citizens as much as by theorists, based on the systematic nature of legal systems rather than a description or observation; and, second, that Dworkin's legal principles are more moral reasons for changing the law than they are aspects of the law as it currently is. See Joseph Raz, "Legal Principles and the Limits of Law" in *Ronald Dworkin and Contemporary Jurisprudence* ed. by Marshall Cohen (Totowa, NJ: Rowman & Allanheld, 1984) at 73–87.

146 Theories are models: efforts to “boil down” complicated reality, and the variety  
147 of experience over time and across societies, to claims regarding what is “essential”  
148 amid the details and the differences. One could even argue that the problem is with  
149 theories of law that work *too* hard to account for nuance (*e.g.*, accounting for all the  
150 different kinds of legal rules, etc.) that they lose the basic insight about law’s nature.  
151 They are like maps that are large and detailed, almost as big as the area they pur-  
152 port to describe, creating realistic portraits of the area, but doing so at such a large  
153 size that they are no longer functional, and can no longer serve their intended func-  
154 tion of helping us to find quickly the best route from one place to another.<sup>16</sup>

155 Theories and models involve, by their nature, trade-offs. The power or insight of  
156 the theory is to be weighed against the simplification, distortion, or mis-characterization  
157 involved in reducing the complexity of life to a simple picture. In economic model-  
158 ling, it is sometimes argued that any distortions of human behaviour presented in the  
159 model are compensated for by the value of the model in predicting human behaviour.  
160 There is debate regarding whether in fact economic models *are* successful in  
161 predicting behaviour,<sup>17</sup> but that is, for our purposes, beside the point. What is relevant  
162 is that prediction of events is a (relatively) objective matter, a marker most of us can  
163 agree upon as a valuable counter-weight to the cost of any distortion within the model.

164 However, within jurisprudence there are additional problems. How can one discuss  
165 the meta-theoretical trade-offs in theories of law if there is no consensus regarding  
166 either intermediate or ultimate values? One must first know what one is aiming for  
167 and what would count as success before one can even think about costs and benefits  
168 in relation to theory construction. What is it that we are doing, or trying to do, when  
169 we theorize about (the nature of) law?

170 This is a basic question for legal philosophers – as Nigel Simmonds put it in  
171 discussing the challenge facing Herbert L. A. Hart and those who came after him:  
172 “once essentialism (...) was avoided as an option, it became hard to see how an  
173 investigation of law’s nature could be anything other than an empirical matter.”<sup>18</sup>  
174 Is there something *philosophical* to be said about law, that goes beyond mere  
175 historical and sociological investigations? But certainly Kelsen and Hart, and Finnis,  
176 Dworkin, and Raz – and likely Austin as well – thought of themselves as doing  
177 something different than empirical investigation.

178 What is the benefit we seek from a successful theory of law? Raz speaks of  
179 the ultimate objective of legal theory as explaining part of our community’s self-  
180 understanding.<sup>19</sup> For Ronald Dworkin, it is an interpretive process that reworks

<sup>16</sup> For a discussion of “reductionism” in the theories of John Austin, Hans Kelsen, and James W. Harris, see Brian H. Bix, “Reductionism and Explanation in Legal Theory” in *Properties of Law: Essays in Honour of Jim Harris* ed. by Timothy Endicott, Joshua Getzler and Ed Peel (Oxford: Oxford University Press, 2006) at 43–51.

<sup>17</sup> See, *e.g.*, *Judgment Under Uncertainty: Heuristics and Biases* ed. by Daniel Kahneman and Paul Slovic Amos Tversky (Cambridge: Cambridge University Press, 1982).

<sup>18</sup> Nigel E. Simmonds, “Law as a Moral Idea” (2005) 55 *U. Toronto L.J.* 61 at 69–70.

<sup>19</sup> Raz, *Between Authority and Interpretation*, *supra* note 8 at 17–46.



existing practices in their best moral or political light.<sup>20</sup> For Liam Murphy, it is selecting or constructing the theory whose belief by society would have the best consequences.<sup>21</sup> For Sean Coyle, it is part of an exploration of the role of law in realizing the good.<sup>22</sup> For John Finnis, similarly, the objective of legal theory is, or should be, about asking the "why" question: "Why have law?" How does law fit within the moral requirement to seek the common good?<sup>23</sup> If we do not know what the objective of theorizing is, or if we cannot agree on what it should be, it will be difficult even to begin the discussion of when a theory's lack of fit is justified by its achievements.

Ronald Dworkin's concept of constructive interpretation gives an example of how trade-offs might be understood in theorizing. According to Dworkin, an interpretation (here of a social practice, though for Dworkin the claim is generalized to all interpretation) must meet some minimal level of fit with the practice being interpreted; otherwise it would not even qualify as an interpretation. Beyond that, one would either choose the best interpretation that also had the minimal level of fit (according to an early version of the theory<sup>24</sup>) or choose the theory that had the best combination of fit and value (according to later versions<sup>25</sup>).

A different question arises when it is not a straight trade-off, but rather a weighted choice. When Hart urges us to take into account the internal point of view, his argument is that this perspective is more central and (therefore) more important than the perspective of those who do *not* perceive the law as giving them reasons for action.<sup>26</sup> It is because this is a richer, better, fuller, or more central explanation that the theory should be built around it, rather than on a different basis, even if that other basis might have a better overall fit with perceptions and practices.<sup>27</sup>

It is in the nature of trade-offs, that the greater the insight one believes that the theorist (Austin or Raz or Kelsen or Dworkin) has offered, the greater the deviation from participant perception ("lack of fit" or "mistakes") that one will condone in the details of the theory. Even granting this much, the problem is that the existence and quality of an "insight" often seems to vary from one reader (observer) to another, and also over time. Thus, while in one era a theory's mistakes might seem trivial relative to the insight offered, in another era that same lack of fit might seem fatal. Thus, to many, and perhaps to most, Austin's theory looks untenable now, and, for these same observers, it may not be easy to understand how Austin's theory could

<sup>20</sup> Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986).

<sup>21</sup> Liam Murphy, "The Political Question of the Concept of Law" in *Hart's Postscript* ed. by Jules Coleman (Oxford: Oxford University Press, 2001) at 371.

<sup>22</sup> Sean Coyle, *From Positivism to Idealism* (London: Ashgate, 2007) at 10.

<sup>23</sup> John Finnis, "Law and What I Truly Should Decide" (2005) 48 *Amer. J. Juris.* 107.

<sup>24</sup> Dworkin, *Taking Rights Seriously*, *supra* note 9.

<sup>25</sup> E.g., Dworkin, *Law's Empire*, *supra* note 20.

<sup>26</sup> See Hart, *The Concept of Law*, *supra* note 2 at 82–91; see also Finnis, *Natural Law and Natural Rights*, *supra* note 3 at 3–18.

<sup>27</sup> Cf. Finnis, *Natural Law and Natural Rights*, *supra* note 3 at 4–11 (criticizing Kelsen's theory for seeking "the lowest common denominator" of all legal systems: *ibid.* at 10).



214 ever have been as dominant as it was. While for many of these same contemporary  
215 commentators, any lack of fit exhibited by, say, Joseph Raz's exclusive legal posi-  
216 tivism is worth carrying for the insights that theory offers about the connections  
217 between law, rules, reasons for action, and authority. How much deviation from  
218 practice one believes a theory can carry will inevitably be a matter of *judgement*.

## 219 1.5 Not (Quite) Trade-Offs

220 Perhaps we move too fast to be speaking of trade-offs for theories of law. Some  
221 theorists argue that there is no need to speak of trade-offs, because the theories in  
222 question in fact do not suffer from any lack of fit. Rather, the practices and percep-  
223 tions that purport to differ from the theories are in fact untenable. For example,  
224 under a Razian analysis, judges may think that because they are applying moral-  
225 sounding constitutional provisions, they are declaring a pre-existing legal status,  
226 rather than making new law, when they invalidate a statute. However, Raz would say  
227 that this cannot be, for it is contrary to matters essential to the nature of law.<sup>28</sup>  
228 Similarly, under a Dworkinian analysis, a judge may think that she is declaring the  
229 legislators' intentions for some statute, intentions that are purely matters of fact, but  
230 Dworkin would insist that this simply misunderstands what legislative intentions  
231 are or could be.<sup>29</sup>

232 A final example, further afield, comes from the Scandinavian legal realists (*e.g.*, Alf  
233 Ross, Karl Olivecrona, and Vilhelm Lundstedt), who criticized the normative language  
234 (*e.g.*, "right" and "duty") used in law.<sup>30</sup> The Scandinavian realists believed that  
235 concepts like "legal right" and "legal duty" were phrases without a reference, and could  
236 be explained only in terms of subjective psychological feelings of power or binding-  
237 ness, or the residue of ancient beliefs about magical powers. These theorists did not  
238 doubt that citizens and legal officials referred to "legal right" and "legal duty" as though  
239 they were objects that somehow existed in the world, but in that, the Scandinavian  
240 realists argued, the citizens and officials were simply deceiving themselves.

241 A different alternative to a "trade-off" analysis would be that theorizing should  
242 be understood in terms similar to Willard V. O. Quine's "web of beliefs." Under this  
243 analysis, we have inter-connected views, that hang or fall together, and facts that do  
244 not initially seem to fit into our beliefs may require adjustments in aspects of the  
245 interconnected propositions, but that almost any such fact can be accommodated,  
246 albeit at times with some uncomfortable stretching in those beliefs.<sup>31</sup>

<sup>28</sup> See, *e.g.*, Raz, *Ethics*, *supra* note 8 at 204–10.

<sup>29</sup> See Dworkin, *Law's Empire*, *supra* note 20 at 313–54.

<sup>30</sup> See, *e.g.*, Brian H. Bix, "Ross and Olivecrona on Rights" (2009) 34 *Australian J. Legal Phil.* 103.

<sup>31</sup> *E.g.*, Willard V.O. Quine, Joseph S. Ullian, *The Web of Belief* (New York: Random House, 1970). Quine was referring to the effect of sensory experiences on the periphery of our web of beliefs, but the notion also works, in broad analogy, with the topics discussed in the text.

Theorists who do not entirely deny that there are mistakes or deviations in comparing their theories to actual practices and perceptions may instead discount the importance of the deviations. These discounting arguments come in certain common forms. First, there is the argument that the way certain judges, lawyers or citizens speak about the law does not reflect their actual views about the law, but instead reflects only certain conventions of presentation. This argument is often used in response to the observation that judges frequently speak about “finding” or “discovering” existing law (rather than creating new law) even when the outcome seems far different than prior decisions and other settled law.<sup>32</sup> Second is the argument that judges and lawyers may characterize their actions in a certain way to respond to the political pressures and misunderstandings by naïve citizens (*e.g.*, who do not want to think of their unelected judges as making new law, or making “political” judgements in interpreting and applying the law); according to this argument, these judges and lawyers do not believe the characterizations they report. Third (though this is seen far less often than the other two) is the claim that the judges, lawyers, and some citizens as well, are simply deceiving themselves. When the great English common law judges and commentators of the medieval and renaissance periods claimed that judges merely discover existing law, is it possible that at some level even these sophisticated and worldly observers actually believed that? Perhaps some of them did, and perhaps they did because it helped them to avoid facing unpleasant political and legal issues.

## 1.6 Is Law Distinctive?

In discussing legal theories, past and present, in this work, I have spoken in abstract terms regarding the process of building theoretical models, and the trade-offs within a theory. One issue left unconsidered is whether law, and theorizing about law, might be different in important ways from other theorizing about social practices, distinctive in ways that affects our thinking about models and trade-offs.

One difference that might be worth noting that is law has a role (at least an arguable role) in our practical reasoning – reasoning about what we ought to do and how we ought to live – that most other social practices do not have or claim to have. This aspect of law has been particularly emphasized by natural law theorists, but is accepted, to different degrees and in various ways, by many other theorists as well. As John Finnis has argued, law has a “double life”: it is simultaneously a social/historical fact and a normative system.<sup>33</sup> Law as a social-historical fact is constituted

<sup>32</sup> Cf. Scott Altman, “Judicial Candor” (1990) 89 *Mich. L. Rev.* 296; Paul Butler, “When Judges Lie (and When They Should)” (2007) 91 *Minn. L. Rev.* 1785.

<sup>33</sup> *E.g.* John Finnis, “The Fairy Tale’s Moral” (1999) 115 *Law Quarterly Review* 170, 170; John Finnis, “On the Incoherence of Legal Positivism” (2000) 75 *Notre Dame Law Review* 1597, 1602–6.



281 by the actions of officials within a particular legal system from its beginning to the  
282 present. There are propositions about law which are primarily summaries of what  
283 decisions legislatures and judges, and perhaps also administrative agencies and  
284 executive/enforcement officials, have made over time. Such claims are made by  
285 social scientists and other academics, as well as by legal practitioners and judges.

286 Often, when claims are made about the law, there is some ambiguity regarding  
287 whether the claims are descriptive/historical, regarding what actions were actually  
288 taken by officials in the past, or whether there is some element of modifying,  
289 re-characterizing, or reforming the rules to make the current (or future) cases better.  
290 And when theories are offered of areas of law, the detailed case outcomes are built  
291 into generalizations in ways that reflect a conscious bias towards making the overall  
292 picture more just or at least more coherent. This is sometimes described as "rational  
293 reconstruction."<sup>34</sup>

294 The way that law has an aspect of social practice and an aspect of practical  
295 reasoning certainly complicates any effort to theorize about the nature of law.  
296 And it may make a difference on what counts as a cost or a trade-off in theorizing  
297 about law. However, it is not clear that law's distinctive nature changes the general  
298 meta-theoretical question about how one balances insight and distortion: the  
299 comparison of costs and benefits appears to remain comparable with what occurs  
300 with theories in other areas.

## 301 1.7 A Different View of Austin

302 I want here to take a brief break from general discussions of theorizing and lack of  
303 fit to return to Austin, and consider what arguments might be raised on his behalf.

304 The argument for Austin might go as follows (and no claim is being made that  
305 this argument can be found in Austin's own works, or even that he would have  
306 approved of it had it been brought to his attention). Austin's theory simplifies, and  
307 therefore distorts, but the simplification is a necessary cost for an important objective:  
308 uncovering a basic insight about law.

309 Regarding the problem of theoretical objectives, discussed earlier, one might  
310 note first that there are significant doubts regarding what Austin saw himself as  
311 offering in this theory. At one or two points in his lectures on jurisprudence – but  
312 (to my knowledge) not much more often, in the course of over 1,000 pages of  
313 text – Austin describes his work as offering a "science" of law.<sup>35</sup> This may parallel  
314 the continental European theorists he had read, and later continental theorists like  
315 Kelsen, who saw their conceptual analyses as part of a "science" of law. At the same

<sup>34</sup> Rational reconstruction is comparable to what Ronald Dworkin has called "constructive interpretation." Dworkin, *Law's Empire*, *supra* note 20 at 49–53.

<sup>35</sup> See Austin, *Lectures*, *supra* note 1 at vol. 2, 1107–08.

time, modern commentators find that Austin's discussions could be as easily  
interpreted as description (this is what is true of all known legal systems) as concep-  
tual (this is what is necessarily true of any legal system).<sup>36</sup> A conceptual objective  
would make it easier to speak of "insights" that justify any lack of fit.

There are different (but related) ways of characterizing the insight(s) about law  
that can be drawn from Austin's command theory. First, that law is essentially about  
power.<sup>37</sup> Second, that law is best understood (and best practiced) as a top-down  
institution, with norms imposed by the government on its citizens, rather than as a  
bottom-up institution (as both the classical commentators on the English common  
law and the continental historical jurisprudence theorists would have it). Third, that  
every legal system has some entity whose power is effectively unconstrained.<sup>38</sup>

From the perspective of some of these perspectives, it is a benefit, not a draw-  
back, that Austin's theory does not incorporate the perspective of citizens who view  
the law as creating reasons for action. From this Austinian approach, it is the Hartian  
legal positivist approach that is mistaken, in its apparent willingness to join certain  
strains of natural law theory in focusing too much on how law can or should create  
(moral) reasons for action.<sup>39</sup>

Of course, one response to a revised Austinian theory would be in much the same  
tune as prior criticisms: that this is a theory built on a poor fit with actual practices  
and perceptions (what might less delicately called "mistakes"), and thus cannot  
claim to have uncovered insights, only distortions. Under the Dworkinian analytical  
structure mentioned above, the argument is that the theory's fit with the practice is  
too poor to even qualify as an "interpretation." (Perhaps under a coherentist view,  
like Quine's web of beliefs or Thomas Kuhn's discussion of "paradigms,"<sup>40</sup> it is the  
claim that certain facts are so hard to incorporate into the existing analytical or  
conceptual structure that the whole structure must be rejected and replaced).

To some extent this is the argument that is still going on in legal theory, relating  
not only to Austin's work, but more generally regarding the role of coercion in the

<sup>36</sup> Roger Cotterrell, *The Politics of Jurisprudence* (2nd ed., London: LexisNexis, 2003) at 81–83. Here, contrast William L. Morison's view of Austin, William L. Morison, *John Austin* (London: Edward Arnold, 1982) at 2 (Austin's focus was to portray law "empirically") with Julius Stone's view, Julius Stone, *Legal System and Lawyer's Reasoning* (London: Stevens, 1964) at 68–69 (Austin as a conceptual theorist).

<sup>37</sup> Cf. Grant Lamond, "Coercion and the Nature of Law" (2001) 7 *Legal Theory* 35; Grant Lamond, "The Coerciveness of Law" (2000) 20 *Oxford J. Legal Stud.* 39; Danny Priel, "Sanction and Obligation in Hart's Theory of Law" (2008) 21 *Ratio Juris* 404; Frederick Schauer, "Was Austin Right After All?: On the Role of Sanctions in a Theory of Law" (2010) 23 *Ratio Juris* 1; Nicos Stavropoulos, "The Relevance of Coercion: Some Preliminaries" (2009) 22 *Ratio Juris* 339.

<sup>38</sup> Portions of the above paragraph derive from Cotterrell, *Politics of Jurisprudence*, *supra* note 36 at 49–77.

<sup>39</sup> See Frederick Schauer, "Positivism Through Thick and Thin" in *Analyzing Law* ed. by Brian H. Bix (Oxford: Oxford University Press, 1998) at 65–78.

<sup>40</sup> Thomas S. Kuhn, *The Structure of Scientific Revolutions* (2nd ed., Chicago: University of Chicago Press, 1970).



344 nature of law.<sup>41</sup> Those who believe that coercion is central to law's nature think that  
345 theories of law that omit or discount coercion are missing something basic. Theorists  
346 on the other side of the issue make comparable criticisms, asserting that it is the  
347 coercion-centred theories that are missing something essential.<sup>42</sup>

## 348 1.8 Conclusion

349 Of course, there are no bright-line rules for determining when a theory of some  
350 practice is tenable and when it is not, and when an existing way of understanding a  
351 practice needs to give way in the face of purportedly recalcitrant facts. (And this is  
352 not merely because we are dealing here with social practices rather than the physical  
353 sciences; a similar lack of bright lines applies also to when one Kuhnian paradigm  
354 within science must give way to another<sup>43</sup>).

355 To some extent, the success or failure of a theory becomes a matter of perception  
356 and a matter of judgement among the consumers of theory. Legal theories – like all  
357 other ideas – arise in response to the intellectual questions and practical concerns of  
358 the time in which they arise.<sup>44</sup> They may yet adapt or be re-characterized in ways  
359 that make them seem responsive to the questions and concerns of another period,  
360 but inevitably there will come a time when a theory that once seemed powerful and  
361 important begins to seem instead quaint and without use to a new generation of  
362 thinkers. And such changes in perception likely occur also at the level of compo-  
363 nents of theory, and components of theory-construction. For one generation, the  
364 insights of Austin's (or Kelsen's or Raz's) theory might seem central, and the devia-  
365 tions trivial, while for a later generation, the insights might seem small or hard to  
366 accept, while the deviations seem fatal.

367 Theories of the nature of law are relatively “unmoored,” lacking, on one hand,  
368 the constraint of prediction of events; and, on the other hand, any agreed purpose.  
369 It should thus not be surprising that there is significant disagreement among theorists.  
370 There is disagreement about how to characterize certain of the facts on the ground,  
371 but even where agreement can be found on that, disagreement remains, as reasonable  
372 people can choose differently when faced with theories that make different choices  
373 about what is important, what counts as “insight,” and how much of participants’  
374 perceptions or “common sense views” one can or should throw overboard in the  
375 name of theory-building.

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<sup>41</sup> See publications listed *supra* note 37.

<sup>42</sup> And, a similar debate goes on around economic theories of law, where the question is whether the rational actor model is a great insight around which to build a predictive model, or is instead a politically biased and empirically disproven misreading of human nature.

<sup>43</sup> See Kuhn, *Structure of Scientific Revolutions*, *supra* note 40.

<sup>44</sup> A point made by Joseph Raz, among others. See, e.g., Raz, *Between Authority and Interpretation* *supra* note 8 at 3.

The theorist has resources available when faced with apparent deviations between 376  
a theory and people's practices and perceptions. It can be argued that apparent 377  
deviations just reflect conventions of presentation, deceptions, or self-deceptions. 378  
Alternatively, it can be argued that any characterization of the relevant practices other 379  
than the one offered by the theory is unsupportable. Beyond that, a theorist's claim 380  
in the face of recalcitrant data will be some variation of the trade-off metaphor: that 381  
the cost involved in deviating from the practices and perceptions is worth accepting 382  
in light of the insights discovered and displayed by the theory. 383

Theory construction, especially where the theory is not anchored by falsifiable 384  
predictions, is often more a matter of persuasiveness, rather than a matter of truth. 385  
And if John Austin's theory seems less sustainable than it once did, that may say as 386  
much about us, and what concerns us, as it does about his theory. 387

Uncorrected Proof

## Chapter 2 Austin's Methodology? His Bequest to Jurisprudence

Andrew Halpin

### 2.1 Introduction

Contemporary Anglophone legal theory<sup>1</sup> attracts some of the brightest minds in the legal academy. Their output is intellectually sophisticated, vibrant, occasionally flamboyant, and richly diverse. To engage with this material as a student can be rewarding in terms of broadening and deepening the academic study of law in ways that other subjects do not even aspire to. If some students fail to engage, this can still be regarded as a sign of the elevated status of legal theory, or jurisprudence, as a subject: only those with real aptitude and application can scale its heights. Yet there are other cases of disengagement which are less easy to dismiss.

One cause for concern is the disengagement of the professions with legal theory. Although this could be regarded as part of a blanket attitude on their behalf towards academic law,<sup>2</sup> an inability by legal theorists in this wider setting to communicate anything of use to practitioners would still raise fundamental questions about the purpose and value of jurisprudence. The concern becomes more marked when

<sup>1</sup> Recognition of a different relationship between academic law and legal practice within Continental Europe, and the implications of that for the development of legal theory, provide reasons for constraining the present essay to a consideration of legal theory in the English-speaking world. Despite acknowledging the influence of Continental legal theorists (see *infra* note 12), the emergence of a modern subject of Anglophone jurisprudence is treated here as a distinct event. Although historically something of an artificial construction (that also overlooks pre-Austinian Scots legal theory), it exerts a dominant influence on the shape and subject matter of Anglo-American jurisprudence today.

<sup>2</sup> Influential examples of such attitudes are provided by Harry Edwards, "The Growing Disjunction between Legal Education and the Legal Profession" (1992) 91 *Michigan Law Review* 34, and Robert Goff, "The Search for Principle" (1983) 69 *Proceedings of the British Academy* 169.

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the disengagement takes place among other legal academics, of a more doctrinal or practical persuasion, who see no value added from legal theory to their own academic interests. Such an attitude is less prevalent now than it was 30 or 40 years ago, but it is far from extinguished. For one thing, theoretical intrusions into subjects such as Torts, Contract, and Criminal Law, tend to be limited to the particular concerns of the subject in question rather than engaging with the general questions of jurisprudence. More significantly, there remain leading figures in these other fields who are openly dismissive of legal theory, either modestly claiming that it is beyond their reach, or confidently asserting it is of no use – “Theorists can spend their time theorising the subject; my job is to get on with actually doing the subject.”<sup>3</sup>

Although the disengagement of students, practitioners, and other legal academics might ground genuine concerns, it is not my purpose to address them here, except to suggest tangentially that any such concerns may be related to the root concern I shall investigate. These other concerns can properly be expressed in questions about the purpose and value of jurisprudence. However, we do not need to look so far for the insinuation that jurisprudence is of no earthly use at all, and that the work of legal theorists has acquired the self-indulgence of medieval scholasticism. This is a charge that has been made from within legal theory itself.<sup>4</sup> For all the intellectual energy that has been poured into the subject, legal theory today as a discipline is fragmentary and schismatic. Its debates are often ferocious, and more often inconclusive. The root concern to be addressed here is that legal theorists are disengaged from each other.

This may be regarded as a root concern in two senses. In the instrumental sense already given, it may lie at the root of the disengagement and disenchantment with legal theory found among other potential stakeholders in the subject. That sense, I have already indicated, will not be developed here beyond the scope of the suggestive. The primary sense to be investigated in detail is intimately bound up with the subject itself and deeply historical. The concern is that at its roots jurisprudence in the English-speaking world emerged as a subject already disengaged with itself, or, less cryptically, in a state that made the mutual disengagement between legal theorists inevitable.

In order to trace and explain this state of affairs, we shall need to excavate the historical origins of jurisprudence, and survey the wider issue of theoretical disagreement as it persists within contemporary jurisprudence. If the concern is substantiated, two tantalising lines of inquiry open up. What could have happened differently at the founding of jurisprudence as a subject? What might be different in the state of legal theory today? The radical opportunity then presents itself. If the current disengaged state of legal theory is traceable to a particular historical moment in

<sup>3</sup> Evidence for this class of the disengaged is best kept anecdotal and anonymised, but is readily available.

<sup>4</sup> Initially brought against legal positivism by Ronald Dworkin, it has also been turned against Dworkin himself. See Andrew Halpin, “The Methodology of Jurisprudence: Thirty Years Off the Point” (2006) 19 *Canadian Journal of Law and Jurisprudence* 67 at 77, 97 (V)(j); 86–87.



establishing its foundations, could an adjustment to that process produce (across all aspects) a more engaged theory of law?

These issues are explored within the following five sections of this essay. In the next Sect. 2.2, the controversy over establishing a "province of jurisprudence" is introduced. This controversy is linked to the attempt to establish an exclusive determination of the subject matter of jurisprudence against a backdrop of contestability. Section 2.3 then broadens the discussion of theoretical contestability and disagreement, and identifies three particular strategies by which a favoured theoretical viewpoint can take command of a subject as against opposing viewpoints: axiomatic disengagement, ambitious insight, and a split field of inquiry. Austin's approach is suggested here as taking the form of ambitious insight, a suggestion that is fully examined in Sect. 2.4, focusing on Austin's key distinction between what law is and what law ought to be. The details of Austin's approach, as examined in this section, are considered incompatible with his having established a common methodology for analytical jurisprudence. Section 2.5 uses Austin's own doubts about the success of his project as a platform for a critical challenge to his simple is/ought divide. The challenge arises from recognising a hybrid category of what the law ought to be regarded as being, associated with the activity of legal reasoning once the insufficiency of existing legal materials is acknowledged. The final Sect. 2.6, discusses a common aversion to legal reasoning when expounding a general theory of law shared by leading legal positivists. The combination of this characteristic with a tendency towards exclusivity in shaping the subject matter of jurisprudence is regarded as the greater part of Austin's bequest to jurisprudence, and as the basis for attributing responsibility to him for the current disengaged state of legal theory. However, the section concludes with the neglected part of Austin's legacy, found in his doubts, and his insistence that legal theory should be engaged with practice. It is this part of his legacy that is regarded as an overlooked inspiration for a fundamentally different direction for legal theory.

## 2.2 The Controversy

When John Austin's introductory lectures were published in 1832 under the title, *The Province of Jurisprudence Determined*,<sup>5</sup> that title was sufficient to signal the intention of Austin to capture as the subject matter of jurisprudence what had previously been obscure or contestable, or both. Subsequent allusions to the title have indicated that Austin's efforts, for all their significance in promoting jurisprudence as a distinct subject, have not succeeded in resolving the controversy over its subject matter.

<sup>5</sup> John Austin, *The Province of Jurisprudence Determined* (first published, 1832) ed. by Herbert L. A. Hart (London: Weidenfeld & Nicolson, 1954); ed. by Wilfrid E. Rumble (Cambridge: Cambridge University Press, 1995). Citations below are from the Hart edition, with page references to the Rumble edition provided in square brackets.

92 Halfway through the last century, Julius Stone in *The Province and Function of*  
 93 *Law*,<sup>6</sup> argued against an exclusively analytical aspect to the Province, insisting that  
 94 room should be made for questions of justice, and the social meaning of law. More  
 95 recently, Allan Hutchinson's choice of title for his book in 2009, *The Province of*  
 96 *Jurisprudence Democratized*, leaves no doubt that the subject matter remains con-  
 97 testable. Hutchinson adopts a more radical approach to Stone, seeking to dismiss  
 98 analytical jurisprudence entirely in favour of a jurisprudence that is politically  
 99 committed to local concerns and informed by a notion of strong democracy.<sup>7</sup>

100 The precise nature of this contest is not altogether clear. What is clear is that it  
 101 is not simply a dispute with Austin's jurisprudence, with the particular details of his  
 102 theory of law or with the positions adopted by Austin in addressing specific juris-  
 103 prudential topics. Whatever evaluation, or re-evaluation, may be made of Austin on  
 104 those points,<sup>8</sup> there remains something less personal and more far reaching in  
 105 Austin's legacy to jurisprudence. One way of capturing this is to treat Austin as  
 106 the progenitor of an analytical tradition in jurisprudence.<sup>9</sup> Those following in his  
 107 line may no longer exhibit the detailed characteristics of their forebear, but they are  
 108 undeniably indebted to him for their present position and standing. Although a more  
 109 rigorous account would explore other distinct influences on the tradition, notably  
 110 from Kelsen, and consider the details of significant variations within analytical  
 111 approaches to jurisprudence,<sup>10</sup> the historical role of Austin in the founding of ana-  
 112 lytical jurisprudence is unquestionable.<sup>11</sup> As for the intellectual role, that is a broader  
 113 issue, encompassing Austin's intellectual debt to Bentham, and the German and

<sup>6</sup> Julius Stone, *The Province and Function of Law: Law as Logic Justice and Social Control, A Study in Jurisprudence*, second printing with corrections (Sydney: Maitland Publications, 1950). The title of the first chapter, which previously appeared in two parts in (1944) 7 *M.L.R.* 97 and 177, makes Stone's relation to Austin unmistakable: "The Province of Jurisprudence Redetermined."

<sup>7</sup> Allan Hutchinson, *The Province of Jurisprudence Democratized* (Oxford 2009). I consider Hutchinson's position in detail in a conjoined study, sharing much of the scene-setting material with the present article, "The Province of Jurisprudence Contested" (2010) 23 *Canadian Journal of Law and Jurisprudence* 515.

<sup>8</sup> For discussion, see William L. Morison, *John Austin* (London: Edward Arnold, 1982); Wilfrid E. Rumble, *The Thought of John Austin: Jurisprudence, Colonial Reform, and the British Constitution* (London: The Athlone Press, 1985); Robert Moles, *Definition and Rule in Legal Theory: A Reassessment of H. L. A. Hart and the Positivist Tradition* (Oxford: Basil Blackwell, 1987); Wilfrid E. Rumble, *Doing Austin Justice: The Reception of John Austin's Philosophy of Law in Nineteenth-Century England* (London: Continuum, 2004); Neil Duxbury, *Frederick Pollock and the English Juristic Tradition* (Oxford: Oxford University Press, 2004) at 97–106.

<sup>9</sup> Hutchinson, *The Province of Jurisprudence Democratized*, *supra* note 7 at 1–7, 21–24, 29. See also, Stone, *The Province and Function of Law*, *supra* note 6 at 11, in equating the "hegemony of Austinianism" with "the monopoly held by analytical jurisprudence."

<sup>10</sup> On both the influence of Kelsen and different approaches to analytical jurisprudence, see, e.g., Joseph Raz, *The Authority of Law* (2nd ed., Oxford: Oxford University Press, 2009) at 293, 335. The need to differentiate both influences and outputs, becomes particularly acute when Brian Leiter and Ronald Dworkin are brought into an Austinian tradition (as Hutchinson, *The Province of Jurisprudence Democratized*, *supra* note 7, suggests).

<sup>11</sup> Stone, *The Province and Function of Law*, *supra* note 6 at 3, refers to "The Austinian Revelation."



Romanist influences, among others, on Austin. Austin himself, at the start of his "Outline of the Course of Lectures" which was appended to the original publication of *The Province*, admits to borrowing terminology from Hugo and to a lack of originality in the "subject and scope" of his enterprise, which he considered had been recognised by Hobbes, Plato, Aristotle, Cicero and others.<sup>12</sup>

This still leaves open the questions of what exactly it is that Austin bequeathed to analytical jurisprudence, and how that affects the contestability of its subject matter. A simple observation to make is that it is the exclusivity of an analytical approach, traceable to Austin, that lies at the heart of the controversy. Both Stone and Hutchinson take issue with this but differ in their responses. Where Stone adopted a more expansive approach open to "gaining what insights we can from all the approaches to legal theory,"<sup>13</sup> Hutchinson replaces one exclusivity with another: the resources of jurisprudence are to be diverted wholly to "advancing the democratic project."<sup>14</sup> Stone's generosity in welcoming all insights made him less concerned to dwell on what transmitted an exclusivity to analytical jurisprudence. He overlooked the intriguing question of why exactly it was that theories of justice, which Stone was prepared to admit as a branch of his scheme of jurisprudence, were left outside Austin's province of jurisprudence, despite, as Stone acknowledged, Austin's recognition of their significance.<sup>15</sup> Stone contented himself in drawing attention to the lack of fit between a restrictive analytical approach and the actual practice of law,<sup>16</sup> and in suggesting, by way of explanation, that it was the product of its age<sup>17</sup> (an explanation that grows dimmer with the persistence of exclusive analytical jurisprudence through different ages). Hutchinson, in more combative mood, explains and rejects the exclusivity of an analytical approach to jurisprudence in terms of a flawed methodology.

The flawed methodology attributed by Hutchinson to Austin, and to the tradition of analytical jurisprudence that Hutchinson considers has followed Austin's false lead, is "philosophical," focusing on the universal and general rather than the local and particular, employing conceptual analysis in order to provide an account of the essential nature of law.<sup>18</sup> Yet as Hutchinson himself concedes, a conscious interest in

<sup>12</sup> John Austin, *Lectures on Jurisprudence, or the Philosophy of Positive Law*, rev. and ed. by Robert Campbell (5th ed., London: John Murray, 1885) at 32. See further, Stanley Paulson, "The Theory of Public Law in Germany 1914–1945" (2005) 25 *O.J.L.S.* 525 at 525–526.

<sup>13</sup> Stone, *The Province and Function of Law*, *supra* note 6 at 42–43.

<sup>14</sup> Hutchinson, *The Province of Jurisprudence Democratized*, *supra* note 7 at 11.

<sup>15</sup> Stone, *The Province and Function of Law*, *supra* note 6 at 32 and n. 122, 10, accepts the alternative appellation of censorial jurisprudence for theories of justice; acknowledges this was recognised as "censorial jurisprudence" (in Bentham's terminology) or "the science of legislation" (in Austin's terminology); and, was regarded as important by both Bentham and Austin.

<sup>16</sup> *Ibid.* at 42, 71–73. For illuminating discussion on a general tendency towards lack of fit between theory and practice and its possible benefits, related to Austin, see Brian H. Bix, "John Austin and Constructing Theories of Law" (2011) 24 *Canadian Journal of Law and Jurisprudence* 431–440.

<sup>17</sup> Stone, *The Province and Function of Law*, *supra* note 6 at 4–5, 42.

<sup>18</sup> Hutchinson, *The Province of Jurisprudence Democratized*, *supra* note 7 at 3, 15, 23; 11, 18, 60; 22–23, 30–31, 40–41.

methodology has come relatively recently to analytical jurisprudence.<sup>19</sup> When it has emerged, methodology has not proven a unifying force for exponents of analytical jurisprudence but rather an arena for hostilities between them, particularly if Dworkin is admitted among their number,<sup>20</sup> as Hutchinson considers he should be.<sup>21</sup> Although we shall return to the issue of Austin's methodology in some detail below, these preliminary comments on methodology suggest that the factor linking together Austin's bequest to jurisprudence, the exclusivity of analytical jurisprudence, and the contestability of the subject matter of jurisprudence may be found elsewhere. An alternative place to commence the search is the competitive manner in which Austin sought to establish the province of jurisprudence. This competition is sharpest among Austin and Hutchinson with their exclusive claims over the Province. Stone, with his pacific inclinations, can for this stage of the investigation be stood down.

### 2.3 Theoretical Contestability and Theoretical Disagreement

Any theoretical endeavour is likely to encounter obscurity. Why call on theory if everything is already perfectly clear? And within a particular field of theoretical inquiry we can expect competing theoretical accounts of the subject matter to arise, which aim to offer in their respective ways some sort of illumination on that obscurity. So, in a trivial sense, obscurity of subject matter is easily linked to contestability of theoretical viewpoint.

But this trivial link between obscurity of subject matter and theoretical contestability is insufficient to convey the competition on which Austin embarked and which Hutchinson has more recently joined. Each in his own way has sought to radically alter our perception of the subject matter of jurisprudence so as to reveal a very different field of inquiry. Within the appropriate field of inquiry, the appropriate "province of jurisprudence," obscurities can be illuminated by competing theoretical viewpoints, *but outside of the appropriate field of inquiry no useful theoretical work can be undertaken*. Theoretical work attempted outside will be positively harmful in its effects, yielding illusion rather than illumination.

We need to pause in order to appreciate the magnitude of Austin's (and Hutchinson's) claim. The comprehensive illusion suffered by working in an inappropriate field of inquiry is not equivalent to the failing of a particular theoretical viewpoint, which in the ordinary course of the theoretical enterprise loses a contest with other competing

<sup>19</sup> *Ibid.*: at 33. For general discussion, see Andrew Halpin, "Methodology" in ed. by Dennis Patterson, *A Companion to Philosophy of Law and Legal Theory* (2nd ed., Hoboken, NJ: Wiley-Blackwell, 2010).

<sup>20</sup> Dworkin has used methodology to mount a fierce attack against his positivist rivals, but even elsewhere within contemporary analytical jurisprudence, methodological differences tend to map theoretical disagreements. For discussion, see Halpin, "Methodology" *supra* note 19.

<sup>21</sup> Hutchinson, *The Province of Jurisprudence Democratized*, *supra* note 7 at 5, 43–44.



viewpoints, no matter how spurious and unhelpful that particular theoretical  
viewpoint is then considered to be. Such a failed theoretical viewpoint has still  
engaged within a common field of inquiry alongside other competing viewpoints, in  
which its merits or otherwise can be tested, and so may contribute fruitfully to the  
general theoretical enterprise. In contrast to that, what Austin or Hutchinson is  
claiming is that a theoretical viewpoint falling outside the appropriate understand-  
ing of the field of inquiry, just because it is allied to the alternative, inappropriate,  
understanding of the field of inquiry, will entrench that false understanding in its  
competition with any other viewpoints it is prepared to compete with. The outcome  
of that competition can then only yield illusory results.

Perhaps an analogy may prove helpful. Suppose our concern is with the science  
of the wind. More particularly, we wish to understand how to obtain a fair wind to  
carry our ships to their preferred destination. One understanding of the appropriate  
field of inquiry treats the subject matter as essentially involving discernment of the  
mood of a deity in control of the wind and what is required to appease that deity.  
So, for Agamemnon, illumination eventually arrives when the seer Calchas reveals  
that the anger of the goddess Artemis will only be appeased by the sacrifice of  
Agamemnon's daughter, Iphigenia, in order to release the wind that will carry the  
Greek ships to Troy. An alternative understanding of the appropriate field of inquiry  
treats the subject matter as essentially involving discernment of the relationships  
between different atmospheric phenomena so as to predict their outcome as mani-  
fested in a particular form of weather. So, for NASA, illumination is sought from  
experienced meteorologists as to when a fair wind can be expected to assist the  
passage of Endeavour on its voyage to the international space station.<sup>22</sup> Granted that  
Calchas was the best seer available to Agamemnon, and that NASA employs the  
best meteorologists to be found, neither party can produce anything but illusion  
from the viewpoint of the other's understanding of the field of inquiry (though both  
purport to be dealing with predicting the wind).

Having taken the trouble to emphasise the magnitude of the claims made by  
Austin and Hutchinson, we should now express some caution over the readiness to  
overstate such claims. It can sometimes be too easy to cut off theoretical debate by  
proclaiming from one side that the opposition is so steeped in unacceptable axioms  
regarding the nature of the subject matter that no fruitful engagement with them is  
possible. Ronald Dworkin has advanced this type of argument in recent years.<sup>23</sup>  
The practice borrows some credibility from an approach to scientific understanding  
epitomised in Thomas Kuhn's "paradigm shift."<sup>24</sup> Yet even here it is possible to

<sup>22</sup> In July 2009 NASA delayed the launch of the space shuttle Endeavour for three evenings in a row due to bad weather.

<sup>23</sup> Technically, Dworkin has primarily employed the argument to scatter his enemies by the device of placing them in an impossible position with each other. For discussion, see Halpin, "The Methodology of Jurisprudence: Thirty Years Off the Point" *supra* note 4 at 79–81.

<sup>24</sup> Thomas S. Kuhn, *The Structure of Scientific Revolutions* (2nd ed., Chicago: University of Chicago Press, 1970).

211 break out of the apparently self-contained and mutually insulated paradigms, to find  
212 some common ground over which engagement between them becomes possible.  
213 Kuhn himself acknowledged the additional ground of human experience over which  
214 rivalry between paradigms might be contested.<sup>25</sup>

215 So it is not inconceivable that even Agamemnon and NASA might find their  
216 opposing views on the nature of the wind brought into resolvable conflict through  
217 the acknowledgement of some common experience which has to be admitted on  
218 both sides and favours the one viewpoint rather than the other. After all, they can  
219 both agree on identifying the same occurrence as the wind – it is in understanding  
220 its nature that they move so far apart.

221 This brings us to the crux of the matter. If a number of theoretical viewpoints  
222 have *identified* in common a particular subject matter, how precisely does one theo-  
223 retical viewpoint, with its distinctive understanding on the nature of that subject  
224 matter, engage with other theoretical viewpoints which *understand* the nature of  
225 that subject matter in quite different ways?

226 Finding a case of axiomatic disengagement, where it is concluded that there is no  
227 possibility of meaningful discourse between the opposing viewpoints, should be a  
228 last resort. While there is still common acceptance of the identity of the subject matter,  
229 there remains the prospect of finding an argument drawing on some facet of the  
230 experience of that subject matter which will weaken the understanding of one view-  
231 point in favour of the other.<sup>26</sup> Nevertheless, where the axiomatic base of a particular  
232 viewpoint extends beyond an understanding of the subject matter in question so as  
233 to embrace a comprehensive worldview (such as one based on belief in the Greek  
234 Pantheon, or on scientism), then it may have to be conceded for all practical  
235 purposes that no engagement is possible. If so, we should at least record the basis of  
236 the disengagement, so as to clarify where the real opposition between the theoretical  
237 viewpoints lies.

238 Avoiding axiomatic disengagement, how is it possible for one theoretical view-  
239 point to make a claim of the magnitude we have attributed to Austin and Hutchinson?  
240 The claim is extensive, we may recall, because it purports to establish not the  
241 detail of a particular viewpoint on the understanding of the subject matter, but the  
242 general approach to be adopted to understanding the nature of that subject matter –  
243 tantamount to establishing a distinct field of inquiry (a “province”) for the subject.  
244 Frankly, it would be easier to regard this as a case of axiomatic disengagement such  
245 that the claim’s force would lie in adopting an axiom strong enough to be irreconcil-  
246 able with all rival theoretical viewpoints and so dispossess them of explanatory  
247 power at the very threshold of engaging in argument. However, the evidence is that  
248 Austin and Hutchinson are keen to engage with their opponents, and we should seek  
249 an alternative explanation if we can find one.

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<sup>25</sup> *Ibid.* at 72, 77.

<sup>26</sup> For an illustration of this employing Dworkin’s engagement with Hart, see Halpin, “The Method-  
ology of Jurisprudence: Thirty Years Off the Point” *supra* note 4 at 81.



An alternative might be found in the form of their providing an insight on the subject matter that relates to one or more of the key tenets held by opposing viewpoints but is powerful enough to knock out all of those viewpoints for failing to follow through the clear implication of that insight, which leads ineluctably into the favoured field of inquiry as opposed to that previously followed by the opponents. Cast in this form, Austin's engagement with his opponents can be rendered in a simplified manner along the following lines. We commence with the insight delivered on the back of the accepted tenet: you accept that law can be made by the legislature, but on occasion it can be observed that the law so made proves to be far less than justice requires. The clear implication: in order to understand law, we need to be able to understand the law that is unjust. The ineluctable conclusion: we shall not succeed in understanding law by treating the field of inquiry as involving the study of the pursuit of justice, but rather as the study of what processes are capable of producing law.<sup>27</sup>

The magnitude of Austin's claim that any theoretical viewpoint capable of bringing illumination must operate within his field of inquiry now lies not in the strength of an irreconcilable axiom which disengages all opposing viewpoints before debate can commence. Rather, it lies in the ambition of his insight which engages his opponents on common ground before dismissing them fundamentally and comprehensively for failing to attach to that insight the clear implication that he has grasped. The size of the ambition is measured by a dual confidence, that the insight will first be accepted as an insight, and secondly that it leads to the particular implication which broadens out into a recognition of the appropriate field of inquiry for the subject.

Axiomatic disengagement and ambitious insight can be recognised as two distinct routes to reaching the kind of claim made by Austin and Hutchinson over the province of jurisprudence. Before considering in detail what motivated Austin<sup>28</sup> to establish an exclusive field of inquiry for jurisprudence, and the arguments he puts forward to vindicate his claim, there is an ancillary matter that needs to be briefly mentioned.

Another strategy can be adopted to set apart a particular theoretical viewpoint within its own field of inquiry so as to disengage opposing viewpoints. This is to employ the device of splitting the subject matter. The preferred viewpoint is then permitted to reign within a field of inquiry that is limited to one side of the divided subject matter, immune from debate with theoretical viewpoints operating across the divide within the excluded side. The strategy is illustrated by Herbert Hart's suggestion in his Postscript that he and Dworkin had been engaged in separate inquiries (relating, respectively, to a general understanding of law applicable to all municipal legal systems, and an understanding of law within a particular municipal legal system) and hence had not been engaged in the same debate.<sup>29</sup> Putting to one side

<sup>27</sup> Compare Austin, *The Province*, *supra* note 5 at 184–185 [157–158].

<sup>28</sup> For a detailed consideration of Hutchinson's position, see Halpin, "The Province of Jurisprudence Contested" *supra* note 7.

<sup>29</sup> Herbert L. A. Hart, Postscript, *The Concept of Law* (2nd ed.) ed. by Penelope A. Bulloch and Joseph Raz (Oxford: Oxford University Press, 1994) at 240–241.

the plausibility of Hart's suggestion,<sup>30</sup> his motive seems conciliatory rather than hostile, in that both inquiries in such a division can coexist with complementary roles.

Nevertheless, hostilities may break out here. An attempt to impose a split field of inquiry can be resisted by theorists working the other side of the divide who do not accept that their work is as limited as has been suggested, or even feel marginalised by the division. They may consider that their theories do have something pertinent to contribute to the issues on the other side, as is surely the case with Dworkin in relation to Hart, and would appear to be likely for any theorist working on a particular legal system in relation to issues thrown up by a general theory of law – unless we are prepared to countenance a general theory that need not relate to particular instances.<sup>31</sup> The feeling of marginalisation may arise from a sense that the division does not merely represent a practicable division of labour, but introduces a hierarchical ordering of significance: making the work on the other excluded side to be of primary importance. This sentiment has appeared among those who criticise Hart for setting the limits of his field of inquiry to official state law, and deriving a general concept of law exclusive to that limited field of inquiry, thus denigrating other legal phenomena with a lesser status.<sup>32</sup>

Although arranging the boundaries of a field of inquiry, either by actively splitting a recognised field, or by omitting to move beyond the restrictions settled by a recognised field, concerns more the identification of the subject matter than an understanding of the nature of that subject matter, it would be a mistake to deny the connection between the two. Setting the boundaries for what is identified as the subject matter for theoretical investigation will obviously impinge upon how we can view the nature of that subject matter. Put simply, the more expansive the identification of subject matter, the more demanding and competitive it will become to propose a common nature to that subject matter favoured by a particular theoretical viewpoint. Conversely, the narrower the area of field of inquiry that is split off, the easier it is to maintain a particular theoretical viewpoint favouring an understanding of the nature of that subject matter and to isolate it from competing viewpoints.

<sup>30</sup> For discussion, see Halpin, "The Methodology of Jurisprudence: Thirty Years Off the Point" *supra* note 4 at 87, 103 (XI)(a).

<sup>31</sup> Insisting on some commerce between general theory and particular instances becomes problematical for a strict reading of the "philosophical" methodology dealing with law's essential nature or necessary characteristics, attributed to analytical jurisprudence in general by Hutchinson (see *The Province of Jurisprudence Democratized*, *supra* note 18), but certainly found in the work of Joseph Raz. For discussion, see Brian H. Bix, "Raz on Necessity" (2003) 22 *Law and Philosophy* 537, and "Raz, Authority, and Conceptual Analysis" (2006) 50 *American Journal of Jurisprudence* 311; Halpin, "Methodology" *supra* note 19 at 612–614.

<sup>32</sup> See works cited in Halpin, "The Methodology of Jurisprudence: Thirty Years Off the Point" *supra* note 4 at 100 (VII)(k).



## 2.4 Austin's Ambitious Insight and Methodology

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The rendering of Austin's engagement with his opponents in the previous section as a matter of "ambitious insight" can now be examined more closely. It will be recalled that the ambition of the insight was broken down into, first, a confidence that the insight would be accepted, and secondly, a confidence that its acceptance would lead to a recognition of the appropriate field of inquiry, namely, Austin's determination of the province of jurisprudence.

Austin expresses his confidence in no uncertain terms:

The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation. This truth, when formally announced as an abstract proposition, is so simple and glaring that it seems idle to insist upon it.<sup>33</sup>

The insight is "so simple and glaring," but as Austin's following pages illustrate, there are numerous cases where it "has been forgotten." However, Austin remains confident that from the illumination gained from his recalling of the insight, such lapses can readily be written off as "stark nonsense," "to talk absurdly," "abuse of language," "confusion of ideas" and "contemptible imbecility."<sup>34</sup>

Allow then that Austin's confidence in his insight is justified. Once jolted from any forgetfulness we are prone to by his forceful presentation of the facts, we all accept it is possible to have a law that exists but which lacks merit, or fails some standard we would apply to it. The existence of the law is one thing, its failing another. Austin's confidence then naturally flows over into the second stage: acceptance of the clear implication and the ineluctable conclusion. We have to accept that our study of law will have to take in law with and law without merit, law that passes and law that fails a standard of approval; and, in turn, that our study of what law is will differ from our study of whether laws meet some standard or are regarded as having merit. Within that conclusion, already expressed in the passage quoted above, we have all the argument necessary to win us over to Austin's exclusive province of jurisprudence, the study of positive law.

The opening words of Lecture 1 of *The Province* proclaim, "The matter of jurisprudence is positive law."<sup>35</sup> At this point, the title of Austin's book might simply have been, *Jurisprudence: The Study of Positive Law*. The need to determine a province

<sup>33</sup> John Austin, *The Province*, *supra* note 5 at 184 [157].

<sup>34</sup> *Ibid.* at 184–188 [157–161].

<sup>35</sup> *Ibid.* at 9 [18]. Words echoed at the commencement of *The Uses of the Study of Jurisprudence*, *ibid.* at 365 [not contained in the Rumble edition]: "The appropriate subject of Jurisprudence, in any of its different departments, is positive law."

351 of jurisprudence follows a few lines further down, once Austin has pointed out a  
352 problem: the subject of his chosen study can be, and is, easily confused with other  
353 subjects. The task of *determining* the province of jurisprudence is the same as  
354 the task of *distinguishing* the subject of jurisprudence from those other subjects:  
355 "I begin my projected Course with determining the province of jurisprudence, or with  
356 distinguishing the matter of jurisprudence from those various related objects."<sup>36</sup>

357 Since Austin can show that the subject of law that exists differs from the subject  
358 of law that we approve of or has merit (the obvious insight), the province of jurispru-  
359 dence is determined to include the one and to exclude the other. The other subject of  
360 study is entitled by Austin, "the science of legislation: which affects to determine the  
361 test or standard (...) by which positive law ought to be made, or to which positive law  
362 ought to be adjusted."<sup>37</sup> There is no startling methodological technique in establish-  
363 ing the exclusivity of Austin's Province, no distinctive methodology of analytical  
364 jurisprudence that arises at this point. Accept the insight, and all else follows, aided  
365 only by the familiar method of *per genus et differentiam*, a method Austin adopted  
366 without innovation, and tirelessly. In this respect, Austin's approach can be distin-  
367 guished from the analytical approaches of Bentham and later theorists.

368 Hart contrasts Bentham's innovations in the exposition of fictitious legal  
369 entities with a straightforward application of *per genus et differentiam*, referring  
370 to Bentham's techniques of phraseoplerosis, paraphrasis and archetypation.<sup>38</sup>  
371 The problem as Bentham saw it, reported by Hart, was the absence of a meaningful  
372 superior genus to which fictitious entities belonged. Yet at the very point Bentham  
373 is denying the genus, he provides some clue as to its possible construction: "being  
374 of the number of (...) fictitious [legal] entities"; and at a prior point in his lengthy  
375 note, he has acknowledged that they "are all of them (...) the results of some mani-  
376 festation or other of the legislator's will."<sup>39</sup> Moreover, the three innovative tech-  
377 niques mentioned above do not in themselves preclude the application of *per genus*  
378 *et differentiam*: one simply has a greater store of material by which to recognise  
379 membership of a genus or species.

380 An alternative explanation for Bentham giving up on the process, was that it was  
381 simpler and far less work to stop at exposition by reference to the distinctive use of  
382 these fictitious legal entities (which is what the first two innovative techniques  
383 amount to) or their distinctive connotations (covered by the third), rather than then  
384 proceeding to go through all the possible distinctions generated by a rigorous pro-  
385 cess of *per genus et differentiam*. This explanation is supported by Bentham himself  
386 claiming in the same note to have actually undertaken the "uninviting" labour with

<sup>36</sup> *Ibid.* at 9 [18]. The alternative representations of Austin's task as determining or distinguishing are repeated subsequently: *ibid.* at 131, 192–193 [116, 164–165].

<sup>37</sup> *Ibid.* at 366 – from *The Uses of the Study of Jurisprudence*. See also, *supra* note 15.

<sup>38</sup> Herbert L. A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford: Clarendon, 1982) at 129–131.

<sup>39</sup> Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* ed. by James H. Burns and Herbert L. A. Hart (Oxford: Oxford University Press, 1996) ch. XVI para. XXV n. 1.



"voluminous" results as regards only a part of these fictitious legal entities, the rights and powers of property. Further support for the tendency of Bentham to avoid such painfully extensive labour is perhaps provided by John Stuart Mill's contrast between Austin's untying of intellectual knots with Bentham's cutting of them, the latter finding more use for the battering ram than the builder's trowel.<sup>40</sup>

Hart also suggests that Austin followed Bentham in departing from *per genus et differentiam*,<sup>41</sup> relying on Austin's reference to terms that "will not admit of definition in the formal or regular manner."<sup>42</sup> However, Austin makes it clear that these merely form a case of complexity, soluble by "long, intricate and coherent" work. His illustration of this work is sufficient to demonstrate his continuing adherence to *per genus et differentiam*: distinguishing the "various classes" of "Laws or Rules," detaching law from morals, and allowing the student to attend to "the distinctions and divisions which relate to law exclusively."<sup>43</sup>

It is also clear that Austin displays no peculiar affinity to philosophy such as to lead to a special "philosophical" methodology for analytical jurisprudence, contrary to what Hutchinson has suggested.<sup>44</sup> In contrast to Hart, whose primary academic discipline was philosophy, and whose targeted peers to judge his initial academic efforts were Oxford philosophers,<sup>45</sup> Austin's frustration was not to have had his academic output assessed as "a schoolman of the twelfth century – or a [nineteenth century] German [law] professor."<sup>46</sup>

Although it is notoriously difficult to tie Hart down to a specific methodology (philosophical or otherwise),<sup>47</sup> it is undeniable that contemporary exponents of analytical jurisprudence under the influence of Hart have openly embraced a philosophical approach, the most overtly philosophical in methodology being Joseph Raz.<sup>48</sup> However, where Austin makes reference to "essential" or "essentials," the "essence"

<sup>40</sup> In Mill's review of Austin's *Lectures on Jurisprudence* in the *Edinburgh Review* of October 1863, collected under the title, "Austin on Jurisprudence" in Mill's *Dissertations and Discussions* III (1867) and republished in *The Collected Works of John Stuart Mill* XXI ed. by John M. Robson (Toronto: University of Toronto Press, 1984). I am grateful to Philip Schofield for suggesting the significance of Mill's comment.

<sup>41</sup> Hart, *Essays on Bentham*, *supra* note 38 at 130.

<sup>42</sup> Austin, *The Province*, *supra* note 5 at 370–371 – from *The Uses of the Study of Jurisprudence*.

<sup>43</sup> *Ibid.* at 371. See also, Morison, *John Austin*, *supra* note 8 at 60, where Austin's remark on terms not admitting of definition is attributed to "probably just retailing recollected Bentham." Morison points out that Austin "then (...) proceeds to his work on the opposite basis."

<sup>44</sup> Hutchinson, *The Province of Jurisprudence Democratized*, *supra* note 18.

<sup>45</sup> See Nicola Lacey, *A Life of H. L. A. Hart: The Nightmare and the Noble Dream* (Oxford: Oxford University Press, 2004).

<sup>46</sup> As reported by his widow, Sarah, in her Preface to Austin, *Lectures*, *supra* note 12 at 12. Sarah Austin refers specifically to Hugo and Savigny as German professors whose position Austin envied.

<sup>47</sup> See Halpin, "Methodology" *supra* note 19 at 615.

<sup>48</sup> See *supra* note 31, and *infra* note 56.



412 or "nature," "essential difference," and "essential or necessary property,"<sup>49</sup> his  
413 purpose is to identify those characteristics of various objects or notions (such as  
414 law, positive law, independent political society, sovereignty) by which they can be  
415 distinguished from others, in order to get on with his standard method of *per genus*  
416 *et differentiam*. There is no quest by Austin for an elevated philosophical grasp  
417 of "essential nature" or "necessary characteristic." He simply seeks to extrapolate  
418 from empirical observation<sup>50</sup> the character or marks<sup>51</sup> of one thing which set it apart  
419 from another.

420 Austin's use of character and mark clearly demonstrates a directly empirical and  
421 philosophically unsophisticated approach. His liberality in employing these terms  
422 synonymously, and as synonyms for his variety of other terms already mentioned  
423 for conveying essential or necessary properties, distances his vocabulary and  
424 approach yet further from the later philosophically elevated pursuit of essential  
425 nature or necessary characteristics.<sup>52</sup>

426 William L. Morison sought to argue for a "naïve empiricism" on the part of  
427 Austin as making his approach quite distinct from Hart's approach to analytical  
428 jurisprudence.<sup>53</sup> Although Morison's amplification of naïve empiricism has not been  
429 well received,<sup>54</sup> his underlying insight that the methodological and philosophical  
430 approach of Austin differs fundamentally from that of Hart, and in a way that takes  
431 a less sophisticated and more direct approach to empirical observation, is undoubt-  
432 edly sound. One particular manifestation of the empirical grounding of Austin's  
433 theoretical approach is seen when he laments the imperfections of his analysis at the  
434 point where empirical evidence throws up contrary examples.<sup>55</sup> Austin never thinks  
435 to use Raz's demurrer: that his conceptual analysis is not contingent but "philo-  
436 sophically necessary," and so not refutable by empirical evidence.<sup>56</sup>

<sup>49</sup> John Austin, *The Province*, *supra* note 5 at 3, 213–16, 372; 3, 214; 8–9, 193; 211 [12, 181–3, –; 12, 182; 16–17, 165; 179–80].

<sup>50</sup> *Ibid.* at 366 [–], "principles abstracted from positive systems are the subject of general jurisprudence"; 373 [–], "a description of such subjects and ends of Law as are common to all systems."

<sup>51</sup> *Ibid.* at 131–2, 192, 213, 356 [116–17, 164, 181, 289–90] for examples of "character"; and at 131–2, 192, 195, 356 [116–17, 164–65, 167, 289–90] for examples of "mark."

<sup>52</sup> *Ibid.*, e.g., at 213 [181], "a character or essential property"; and, "the two distinguishing marks" of sovereignty at 195 [167] become "two essentials" at 214 [181].

<sup>53</sup> Morison, *John Austin*, *supra* note 8 at 178 ff.

<sup>54</sup> For critical reviews of Morison, see David Lyons, "Founders and Foundations of Legal Positivism" (1984) 82 *Michigan Law Review* 722; Jerome Bickenbach, "Empiricism and Law" (1985) 35 *University of Toronto Law Journal* 94.

<sup>55</sup> Notably in his discussion of "anomalous cases" which render his definition of positive law "defective or inadequate" – Austin, *The Province*, *supra* note 5 at 354 [288].

<sup>56</sup> The starkest presentation of the demurrer is to be found in Joseph Raz, *Between Authority and Interpretation* (Oxford: Oxford University Press, 2009) at 25; see also, *ibid.* at 91–92.

Nevertheless, commentators on Austin have persistently posed a problem in working out whether Austin's work should be regarded as *either* descriptive-empirical *or* conceptual.<sup>57</sup> This dilemma was raised, even prior to Hart, by Stone,<sup>58</sup> drawing on a couple of sentences from "The Uses of the Study of Jurisprudence" in which Austin refers to the "necessary" subjects of general jurisprudence.<sup>59</sup> Stone considers this establishes Austin's ambition for a "universalist analytical jurisprudence" as distinct from the descriptivist "'comparative' jurisprudence" Stone detects elsewhere. Although Austin does also refer here to a criterion of "logical coherence" for these necessary elements, there is nothing to suggest Austin is departing at this point from what can be empirically discovered and described. A stronger suggestion to the contrary arises from the fact that both the necessary elements, and what Austin later distinguishes as being the elements that are "not necessary,"<sup>60</sup> are "to be found" or "in fact occur."<sup>61</sup>

Wilfrid Rumble seeks to perpetuate the descriptive-empirical/formal-conceptual tension by suggesting Austin's work is ambiguous, but then has to implicate John Stuart Mill for failing to appreciate the ambiguity.<sup>62</sup> Michael Lobban rightly finds the suggestion unconvincing and calls for a fuller explanation.<sup>63</sup> The explanation offered here is that to see conceptual analysis as opposed to empirical work through a philosophically specialist perspective on "necessary characteristic" or "essential nature" is to move beyond Austin's (and Mill's) frame of reference where no such tension existed; any detected ambiguity is anachronistically imposed by the observer.<sup>64</sup>

Moreover, it is not as though the move to a more sophisticated, contemporary grasp of philosophical necessity in itself solves the problems of relating theoretical work to the empirical, as can be seen from examining Raz's work.<sup>65</sup> The complexity of his arguments cannot be fully treated here, but two points can be briefly made on the apparent opposition between philosophical necessity and empirical contingency. In the passages previously cited,<sup>66</sup> Raz does allow for the contingency of political and

<sup>57</sup> Discussed by Brian H. Bix, "John Austin and Constructing Theories of Law" *supra* note 16 at 13, and in his entry on Austin in *The Stanford Encyclopaedia of Philosophy*, available at <http://plato.stanford.edu/entries/austin-john/>.

<sup>58</sup> Julius Stone, *The Province and Function of Law*, *supra* note 6 at 67–69.

<sup>59</sup> John Austin, *The Province*, *supra* note 5 at 365–367 [–].

<sup>60</sup> *Ibid.* at 368–369.

<sup>61</sup> *Ibid.* at 366, 369. See also the passages cited in *supra* note 50.

<sup>62</sup> Wilfrid E. Rumble, *Doing Austin Justice*, *supra* note 8 at 96.

<sup>63</sup> Michael Lobban, Review of Rumble's *Doing Austin Justice* (2006) 45 *Journal of British Studies* 221 at 222.

<sup>64</sup> Despite acknowledging the trap of temporal dislocation, Bickenbach, "Empiricism and Law" *supra* note 54 at 106, comes close to falling into it.

<sup>65</sup> Raz, *Between Authority and Interpretation*, *supra* note 56. The chapters of Raz's book have been published previously, and as such have met with the engagement of Bix (see "Raz on Necessity" *supra* note 31). For a critical review of the book, covering the issues discussed here, see Allan Hutchinson, "Razzle-Dazzle" (2010) 1 *Jurisprudence* 39 at 45–49.

<sup>66</sup> See Raz, *Between Authority and Interpretation*, *supra* note 56.



464 social institutions and practices, in contrast to the philosophically necessary (legal)  
 465 characteristics of law. He fails to explore the possibility of necessary political and  
 466 social connections for law, or the possibility of contingent features of legal institu-  
 467 tions. Yet in both cases of the political and the legal aspects of legal institutions it is  
 468 possible for universal abstract characteristics to meet contingent particular instantia-  
 469 tions – suggesting that what is deemed to be a “necessary” characteristic will depend  
 470 upon a judgement as to what level of abstraction is regarded as theoretically  
 471 significant. Secondly, the very contingencies, which Raz has contrived to ignore, of  
 472 those legal institutions which he places at the heart of his concept of law,<sup>67</sup> raise  
 473 questions that Raz has suppressed in asserting that his (what he refers to as “our”)  
 474 concept of law applies to Jewish religious law or contemporary Iranian law.<sup>68</sup>  
 475 Whatever might be made of the philosophical influences that entered analytical  
 476 jurisprudence through Hart, it is not possible to transpose their impact back through  
 477 time on Austin. As Frederick Schauer has pointedly observed, Austin lived before  
 478 “the largely analytic, nonspeculative, nonempirical, and language-focused style of  
 479 philosophy that characterized much of Anglo-American philosophy from Bertrand  
 480 Russell through the time that Hart did his most important work.”<sup>69</sup>

## 481 **2.5 The Detection of Doubt**

482 Towards the end of Lecture VI, the final lecture contained in *The Province of*  
 483 *Jurisprudence Determined*, Austin announces that his determination of the Province  
 484 is imperfect: “is not a perfectly complete and perfectly exact determination.”<sup>70</sup>  
 485 Part of his concern clearly expressed here is the inadequate definition of the elements  
 486 of the subject matter that gave a distinctiveness to the Province. If he has not produced  
 487 an adequate definition of positive law, then the Province cannot be adequately deter-  
 488 mined by reference to that as an exclusive subject of study.

489 For this part of his concern, Austin offers himself some relief. The inadequacy of  
 490 the definition of positive law is seen in certain “anomalous cases” which do not  
 491 quite fit the definition he has proposed, such as where laws bind those who are not  
 492 members of the independent political society. Austin suggests that these anomalous  
 493 cases can be worked out through further refinement (or “supplement”) to his  
 494 definition within the details of his further lectures on the science of jurisprudence.<sup>71</sup>  
 495 Austin similarly disposes of a related problem he detects, how precisely to deter-  
 496 mine who is and who is not a member of a particular independent political society.

<sup>67</sup> Raz, *Between Authority and Interpretation*, *supra* note 56 at 27–31, 40.

<sup>68</sup> *Ibid.* at 40–41.

<sup>69</sup> Frederick Schauer, “(Re)Taking Hart” (2006) 119 *Harvard Law Review* 852 at 857.

<sup>70</sup> As heralded in the marginal note, and then expressed in the main text, Austin, *The Province*, *supra* note 5 at 350–51, 354 [285, 288].

<sup>71</sup> *Ibid.* at 354–55 [288–89]. (The further lectures being found, together with Lectures I–VI, in Austin, *Lectures*, *supra* note 12).



Empirically, it is obvious to him that there is not a single uniform test that applies across all communities.<sup>72</sup> This problem is also reserved for the "detail of jurisprudence."<sup>73</sup>

It is the other part of his concern, which goes without relief, or indeed, any hint of further discussion from Austin in the *The Province*, that has greater importance for our present interests. This is the problem of "the ties" between positive law and the other subjects from which it has been distinguished by Austin:

To determine the province of jurisprudence is to distinguish positive law (the appropriate matter of jurisprudence) from the various objects (noted in the foregoing lectures) to which it is allied or related in the way of resemblance or analogy. But so numerous are the ties by which it is connected with those objects, or so numerous are the points at which it touches those objects, that a perfect determination of the province of jurisprudence were a perfect exposition of the science in all its manifold parts.<sup>74</sup>

Although this problem too is reserved to work that extends beyond the scope of the introductory lectures in *The Province*, Austin is less specific here as to where and how it might be carried out – unlike the definitional "supplement" to deal with the anomalous cases, that could be expected in his remaining lectures. One conjecture is that Austin had further work entirely in mind, beyond his course of lectures, where he might have brought about the "perfect exposition of the science in all its manifold parts." Robert Moles has suggested that Austin's planned but never executed book, *The Principles and Relations of Jurisprudence and Ethics*, is an indication not simply of how *The Province* might have been completed, but also of how it should be understood.<sup>75</sup> It is not possible to do justice to the richness of Moles's argument here, but fundamental problems arise, not least in Moles treating his own confidence, in extracting from certain texts or unpublished fragments of Austin a coherent scheme, as being capable of retrospectively annulling the doubts felt by Austin himself in *The Province*.

Certainly in the *Analysis of Lectures* with which Austin prefaces *The Province*, it is clearly stated that the problem of the ties concerns the relationship between positive law and divine law, and more specifically, between positive law as it is and positive law as it ought to be (the latter being part of divine law in Austin's worldview).<sup>76</sup> And it is here that Austin refers to their respective branches of study, the science of jurisprudence and the science of legislation, as "kindred," and "connected by

<sup>72</sup> *Ibid.* at 356–58 [290–91].

<sup>73</sup> *Ibid.* at 357 [291]. Austin is perhaps sensing (though not fully addressing) here the problem of contingent variation in the instantiation of a general definitional element, raised in relation to Raz, *Between Authority and Interpretation*, *supra* note 56. In Austin's terms, how can we be sure that these differences are not significant in upsetting the common classification of the laws of different societies employing *per genus et differentiam*?

<sup>74</sup> *Ibid.* at 354 [288].

<sup>75</sup> Moles, *Definition and Rule in Legal Theory*, *supra* note 8, particularly at 12–16.

<sup>76</sup> Austin, *The Province*, *supra* note 5 at 6–7 [14].

530 numerous and indissoluble ties.”<sup>77</sup> Indeed, in his Analysis Austin makes a defence  
531 of spending such a considerable portion of *The Province* in dealing with what,  
532 according to its principal thesis, should not fall within the province of jurisprudence  
533 at all: the nature of the way in which man ascertains divine law.<sup>78</sup> The only submis-  
534 sion in his defence is that this subject matter is required in order to deal with “the  
535 *rationale* of jurisprudence” or “the *rationale* of positive law.”<sup>79</sup>

536 Despite these prefatory remarks on the connection between positive law as it is  
537 and positive law as it ought to be, within the body of *The Province* Austin reinforces  
538 his obvious insight, that the existence of a law differs from an assessment of its  
539 merit,<sup>80</sup> with a strong invocation of the is/ought divide. This acts in general as a kind  
540 of running title on the lengthy note at the end of Lecture V (which amounts to a  
541 manifesto for Austin’s campaign for jurisprudence), and in particular as a setting for  
542 the ambitious insight, quoted above, which appears in the paragraph immediately  
543 following these words:

544 Note – on the prevailing tendency to confound what is with what ought to be law or morality,  
545 that is, 1<sup>st</sup>, to confound positive law with the science of legislation.<sup>81</sup>

546 The admonition continues, disposing of a number of other is/ought confusions  
547 and serving as a comprehensive endorsement of the is/ought divide. There appears  
548 to be no opportunity here for raising the problem of the ties as in some way qualify-  
549 ing the possibility of separately determining the province of jurisprudence.

550 What then are we to make of Austin’s doubts on this particular matter? A simple  
551 answer to the quandary would be to suggest that Austin was stressing the value of  
552 complementing a science of jurisprudence with a science of legislation, in the same  
553 way that Bentham sought to promote both an expository jurisprudence and a censorial  
554 jurisprudence.<sup>82</sup> There is clear evidence elsewhere that Austin upheld this view.  
555 However, this response does not do justice to the unequivocal link Austin makes at the  
556 end of Lecture VI between the problem of the ties and the incomplete and imperfect  
557 determination of the Province. The ties between positive law as it is and positive law  
558 as it ought to be are not to be unravelled in order to establish the external relations of  
559 jurisprudence, but to fully determine the internal nature of jurisprudence itself.

560 It would be fruitless to speculate on where these doubts might have led Austin,  
561 and whether they would have been dispelled in his projected work, *The Principles*  
562 *and Relations of Jurisprudence and Ethics*. An air of unfulfilment lingers over the

<sup>77</sup> *Ibid.* These ties are not to be confused with the “ties of resemblance and analogy” mentioned earlier in the “Analysis of Lectures” (*ibid.* at 2 [11]), which Austin announces will be dealt with in “the six ensuing lectures.”

<sup>78</sup> *Ibid.* at 3–4 [12–13]. The subject extends across two whole lectures and a greater part of a third, out of six. For Austin’s principal thesis, *The matter of jurisprudence is positive law*, see *supra* note 35 and accompanying text.

<sup>79</sup> *Ibid.* at 4, 3 [13, 12]. Italics in original.

<sup>80</sup> See John Austin, *The Province*, *supra* note 5.

<sup>81</sup> *Ibid.* at 184 [157].

<sup>82</sup> See *supra* note 15.



life and work of John Austin.<sup>83</sup> However, it would be equally wrong to ignore these doubts. A sensitivity to subtlety and a capacity for astute observation can be discerned in his work beyond that which is often credited to him.<sup>84</sup> If Austin had doubts, there were probably good reasons for them, even if those reasons remained obscure to Austin himself. So let us return to Austin's obvious insight, buttressed by the is/ought divide, and consider whether anything will give.

Austin insists on recognising the two distinct categories: (1) what the law is; and, (2) what the law ought to be. To assail this distinction is to invite the ridicule that Austin readily employed against those who failed to heed it, ranging from the accusation of nonsense to the diagnosis of imbecility. This we shall avoid. Nevertheless, it is possible, without denying the distinctness of the two categories, to add a third.

The third category arises as soon as it is accepted that the present state of (1) is inadequate to provide a clear answer in every case requiring legal judgement. What the law is comprises legal materials that do have a bearing upon the case in question, but they leave it open to further argument as to whether the case should be disposed of in favour of the one party or the other, and what precise consequences should follow. Such argument, what is commonly referred to as legal reasoning, does not, however, amount to category (2). For that category covers the *open field* of reasoning from whatever grounds are thought appropriate, whatever standards meet with the approval of the reasoner, whatever is considered to be the outworking of "the index to the tacit command of the Deity" (*i.e.* utilitarianism) in Austin's view,<sup>85</sup> in order to suggest a way of dealing with the case. It is perfectly plausible for a number of people to engage in (2); for each to come up with a different conclusion,<sup>86</sup> all of them respected as valid instances of (2); and for each of them to accept that his or her own conclusion differs from what the law might be in disposing of the case at hand. Not so with legal reasoning.

Legal reasoning involves, first of all, *some constraint* on the modes and the possible outcomes of the reasoning used to dispose of the case at hand.<sup>87</sup> Secondly, the person

<sup>83</sup> In general, see Lotte and Joseph Hamburger, *Troubled Lives: John and Sarah Austin* (Toronto 1985). See also, Rumble, *Doing Austin Justice*, *supra* note 8.

<sup>84</sup> See the positive review of Rumble's *Doing Austin Justice*, *supra* note 8, on this theme by Matthew Kramer (2008) 20 *Utilitas* 252.

<sup>85</sup> Austin, *The Province*, *supra* note 5 at 6 [14]. Austin, *ibid.* at 186 [159], concedes that due to the insufficiency of utilitarianism as an index to the divine will, different people may come to different conclusions in applying it.

<sup>86</sup> Not simply dealing with the binary issue, favour party A or favour party B, but also determining ways in which the unfavoured party should be made to answer to the favoured party; suggesting that a different party should be held responsible; suggesting radical reforms whereby legal liability should be avoided altogether in favour of compulsory insurance; etc.

<sup>87</sup> A point made pithily by Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Cambridge, MA 2009) at 11: "In a society governed by the wise and the good, legal reasoning is likely simply to get in the way." The precise nature of the constraint is highly contestable, and is probably better viewed as a tension between doctrinal certainty and social critique, which eases in different locations at different times – see *The Use of Legal Materials*, ch. 1 of my *Definition in the Criminal Law* (Oxford: Hart, 2004).



engaged in legal reasoning advances an argument as to what the law ought to be regarded as being in order to dispose of the case at hand. This cannot be expressed as being incompatible with what the law is,<sup>88</sup> nor can it be tolerant of opposing views. The purpose is to exclusively reach what the law is, but through argument rather than incontrovertible deduction.

We have here then a third category differing both from what the law is and from what the law ought to be, a hybrid ought-is: (3) what the law ought to be regarded as being. This third category challenges the sufficiency of Austin's obvious insight which restricts us to the distinction between (1) and (2). And if that restriction lies at the heart of Austin's exclusive determination of the province of jurisprudence, then this too is challenged.

Category (3) may act as a bridge between (2) and (1), in that some of what would fall under (2), as a view of what the law ought to be, can make its way across through what the law ought to be regarded as being, into what the law is regarded as being, which amounts to (1), what the law is. That is to say, legal reasoning may operate as a bridge between morality and positive law.<sup>89</sup>

How does this affect the Province? It provides one way of settling Austin's anxiety, considered above, of how to deal with the problem of the ties. Legal reasoning provides the venue in which it is possible to maintain a dynamic relationship between positive law as it is and positive law as it ought to be; some sort of relationship between what Austin referred to as the science of jurisprudence and the science of legislation. However, this is only possible if legal reasoning is allowed into the province of jurisprudence. In order to achieve this the exclusivity of Austin's Province would need to be breached: acknowledging that the law by which the subjects in a political community are governed is not limited to that which has been "set by political superiors"<sup>90</sup> but extends to the outcome of reasoning with those settled materials. This is something Austin himself did not contemplate in *The Province*, restricting himself there to fleeting endorsements of judicial legislation, and some acknowledgement of the need to deal with vague terms, without detracting from his understanding of law as the command (or rule) established by a political superior.<sup>91</sup>

<sup>88</sup> For the case at hand. It is possible to argue that law previously established for dealing with previous cases should be overturned, but again there are constraints on the legal reasoning that may be effectively employed to this end.

<sup>89</sup> Taking positive law in the sense used by Austin, *The Province*, *supra* note 5 at 9, 202 [18, 172]: "law, simply and strictly so called: or law set by political superiors to political inferiors"; "every positive law, or every law simply and strictly so called, is set directly or circuitously by a monarch or sovereign number to a person or persons in a state of subjection to its author." For Austin, that covers both legislation and judge-made law.

<sup>90</sup> See *supra* note 89.

<sup>91</sup> Austin, *The Province*, *supra* note 5 at 32 [36], endorsing judge-made laws as tacit commands of the sovereign; at 190–91 [162–63], endorsing Lord Mansfield in "assuming the office of a legislator" (while objecting to his enforcement of morality); at 207 [176], recognising vague terms in positive law without affecting its status. Both topics are held over for his later lectures. See *infra* note 93.

Nevertheless, at the end of *The Province*, Austin expressed his own doubts over the exclusive province of jurisprudence that he had constructed. Here, I have expressed more specific doubts over the sufficiency of Austin's obvious insight which undergirds his construction. By challenging the restriction imposed by the is/ought divide, I have opened up the possibility of including legal reasoning within the Province. This would provide a bridge between law and morality, or allow some exploration of "the ties" between positive law as it is and positive law as it ought to be. Whether or not this is regarded as a satisfactory explanation for Austin's doubts, we do know that the exclusion of legal reasoning from a general theory of law has been cause for doubt elsewhere. Hart, in his own final reflections on his major work, admitted to an oversight in that he had "said far too little (...) about the topic of adjudication and legal reasoning."<sup>92</sup> He might reasonably have blamed this omission on the influence of Austin.

## 2.6 Reassessing Austin's Legacy

If, as was suggested in Sect. 2.5, we should reject a particular methodology for analytical jurisprudence attributable to Austin, how then are we to understand his legacy? Is his influence on the exclusion of legal reasoning from a general theory of law, mentioned at the close of the previous section, really so significant? At first sight, it would hardly seem so. It is not as though Austin had nothing to say on topics related to legal reasoning. In his remaining lectures, Austin tackles judge-made law ("judiciary law" as he preferred to label it), legal interpretation, and the use of analogy with a keen eye for the details of the processes involved.<sup>93</sup> However, the significance of excluding legal reasoning from the Province cannot be appreciated without bearing in mind that its absence supports a grander ambition, to take exclusive control of the subject matter of jurisprudence in a fiercely fought contest.

The problem portrayed above with legal reasoning is that it occupies a hybrid ought-is form and operates as a bridge between law as it is and law as it ought to be, even between law and morality. This is an unwelcome presence at the point the battle is being waged to preserve the identity of what law is against the threat of alien forces that would submerge it into some moral or other conception of what law ought to be. The threat is not simply a risk of contamination from the alien influences the other

<sup>92</sup> Hart, *Postscript*, *supra* note 29 at 259. In the remaining pages of the Postscript, as edited, Hart accepts the significance of legal principles (as well as rules), but in effect only so far as they are introduced through a rule of recognition (*ibid.* at 267); and reverts (*ibid.* at 272–276) to his former position on judicial discretion – relying on a restrictive analysis exhausted by settled law or judicial legislation ("judicial law-making"), which is pure Austin. This hardly amounts to saying *more* on the topic of legal reasoning, but it is impossible to speculate how much more Hart might have said, and what its significance might have been.

<sup>93</sup> Austin, *Lectures*, *supra* note 12, Lectures XXVIII–XXXI, and the appended incomplete *Essays on Interpretation and Analogy*. Further consideration of vague terms is also found here, *e.g.*, at 998–999.



side of the bridge. The threat spreads in the admission that the material collected within the fortified conception of law as it is (law as commands – or rules, or norms) is not in itself adequate to deliver the operations law must perform (disposing of every case requiring legal judgement). The admission exposes that material to a broader sweep of its attributes beyond those constituting its narrow legal status or pedigree (as a command, rule or norm). This may adopt an aetiological approach which regards the material as formed by a previous view of what law ought to be, or may attribute to the material some present view of what law ought to be, in order to work out the full effect of that material within the process of legal reasoning.<sup>94</sup>

In this light, it should come as no surprise to learn that Austin's aversion to legal reasoning within his general theory of law is shared by other leading positivist exponents of analytical jurisprudence. Austin's own position on judge-made law differs from Bentham's. As David Dyzenhaus explains it, Austin shared with Bentham an antipathy towards the common law, but not towards judicial legislation, due to Austin's greater faith in an elite judiciary than a popular legislature to decide matters for the benefit of society.<sup>95</sup> However, he takes up a common position with Bentham in excluding legal reasoning from an understanding of law.<sup>96</sup> Hart's position has already been mentioned. The position of Raz is more extreme than Hart's. Far from being susceptible to doubt over not having said enough about legal reasoning, Raz has contributed much on the subject but in doing so has always rigidly demarcated his theory of legal reasoning from his theory of law.<sup>97</sup> As for Kelsen, Stanley Paulson has observed, "The editor of *The Collected Works of Hans Kelsen* reported to me that his published writings – books, articles, and reviews – come to some 17,500 pages. In all that I have read thus far, I have yet to encounter a single page on legal reasoning."<sup>98</sup>

<sup>94</sup> Again, Austin is not unaware of these issues. Consider the fleeting reference to the "rationale" of positive law (*supra* note 79) in *The Province*, or the extensive discussion of the causes of judge-made law in his *Lectures*, *supra* note 12 at 634–635, 644–647. Nevertheless, Austin rigidly avoids setting these topics within a discussion of legal reasoning – the judicial function is exhaustively determined by either applying a rule or creating a rule (*e.g.*, *ibid.* at 998–1000), and it is the rules (or commands) that form the subject matter of *The Province*. See further, Rumble, *The Thought of John Austin*, *supra* note 8 at 116–118.

<sup>95</sup> David Dyzenhaus, "The Genealogy of Legal Positivism" (2004) 24 *O.J.L.S.* 39; Austin, *The Province*, *supra* note 5 at 191 [163].

<sup>96</sup> Gerald Postema, *Bentham and the Common Law Tradition* (Oxford: Clarendon Press, 1986) at 463, concludes his assessment of Bentham's hostility to any judicial legislation with a criticism of Bentham's narrow "identification of law with the execution of *already achieved* agreement or consensus," and his failure to allow into a general theory of law the recognition of "the capacity of (...) legal practice to provide both a *matrix of* and *forum for* the continual forging and re-forging of consensus."

<sup>97</sup> See Raz, *Between Authority and Interpretation*, *supra* note 56 particularly chs. 3, 8 and 14. For criticism, see Hutchinson, *The Province of Jurisprudence Democratized*, *supra* note 7 at 77–78, on the lack of "analytical credibility for a concept of law that tells most judges and lawyers (...) that, whatever they are doing, they are not doing law when they go about the prosaic routines of their lawyering or judicial lives."

<sup>98</sup> Personal communication to author.



It may be easy to account for the motivation of these authors in excluding legal reasoning from a theory of law, which they seek to construct so as to avoid contamination or confusion with a view of what law ought to be according to some moral or other non-legal standpoint. This does not provide justification for the exclusion. The justification provided by Austin's obvious insight goes as far as upholding the distinction between what law is and what law ought to be.<sup>99</sup> It does not extend to the more complex phenomenon of the hybrid-form legal reasoning, which deals with arguing for how the law ought to be regarded as being in order to dispose of a particular case.

The unjustified exclusion of legal reasoning from a theory of law produces a flaw in the foundations of the theoretical enterprise. If as a matter of descriptive fact, the state of the law (as it is) comprises legal materials that are insufficient to dispose of cases requiring legal judgement, and yet a theory of law sets itself up to account for the nature of law as that social phenomenon which has a principal function of disposing of such cases, there is still something left over to be described. By restricting their analysis to those legal materials alone, positivist theories of law ironically sabotage their own positivistic ambitions. Ideally, perhaps, a system of municipal law would contain sufficient materials in an appropriate condition so as to provide by a process of incontrovertible deduction the resolution of all disputes and the regulation of all transactions between its citizens – and *then* an exclusive analysis of those materials would provide an adequate theory of positive law as it is. But, at best, this is a theory of an ideal system of law, or, positive law as it ought to be, not positive law as it is.

More than destabilising the foundations of legal positivism, the approach left to us by Austin is responsible for the disengagement between legal theorists I referred to in the introductory section. This, in two ways. First, and more obviously, the "something left over to be described" by the legal positivists produces a clear opportunity for competing theorists to seize upon the unused part of the analysandum and make of it what they will. But whatever they might make of it, there is no possibility of engagement with the positivists for the simple reason that they have excluded that very part from what they are prepared to deal with in a theory of law.

If this first aspect of the disengagement is made out, we should expect to see some of the most intractable disputes within legal theory revolve around the nature and status of legal reasoning. This is not the place to attempt a rigorous proof of the hypothesis, but as grounds for allowing its credibility consider the following. The Hart-Dworkin debate, which still has not run out of steam, has been presented in terms of disputes over rules versus principles, descriptive versus normative, the separation versus the connection of law and morality; in terms of issues of methodological differences and theoretical disagreement. Each of these dividing lines can be viewed as separating positions which respectively do not and do admit legal reasoning as part of the subject matter that a theory of law has to deal with. Once we recognise the significance of the attitude towards legal reasoning in sustaining division here, it is not difficult to detect it elsewhere: for example, in wider

<sup>99</sup> This is the common justification relied upon by all the positivist authors mentioned.

disagreements over the normative/descriptive divide, including the antagonism between hard and soft positivism.

The second aspect of the disengagement that can be regarded as part of Austin's legacy is less obvious but possibly has had a deeper impact. It has to do with the very attempt to establish a province of jurisprudence. All theory building is territorial in the sense introduced in Sect. 2.3 when discussing the contestability of theoretical viewpoints. Theorists seek to capture an area of ignorance or confusion through dispelling the obscurity with their own theoretical illumination. The distinction with establishing "a province" or "an exclusive field of inquiry" lies in the theorist in that case seeking to exclude certain ways of understanding the subject matter of the inquiry. The promotion of an exclusive field of inquiry necessarily favours certain theoretical viewpoints over others, which would operate with a different understanding of the nature of the subject matter, requiring an alternative field of inquiry.

Nevertheless, Austin's technique for establishing the Province by means of ambitious insight was regarded more highly than the use of axiomatic disengagement, in that there was at the point of constructing the Province an engagement with rival theorists on the common ground held by the insight. There was also more than a hint in Sect. 2.3 that deploying ambitious insight was a more honest strategy than relying on a split field of inquiry which could surreptitiously demote competing viewpoints by artificially excluding or marginalising them. However, the virtue of open engagement with opposing viewpoints, which lifts ambitious insight over axiomatic disengagement or splitting a field of inquiry as a theoretical technique, is found only at the creation of the Province. Once the Province is established as an exclusive field of inquiry, engagement with opposing viewpoints which might challenge the distinctiveness of that field is precluded.

What this may mean, as we discovered in the case of Austin, is that the strength of the obvious insight can dazzle the theorist into a more far-reaching confidence when establishing the exclusivity of a field of inquiry than the ambitious insight can actually bear. Despite initially engaging with viewpoints that Austin discerned could beneficially learn from his insight, by insisting on an exclusive field of inquiry – a province of jurisprudence *fully determined* – he foreclosed engagement outside of the Province with viewpoints providing insights Austin was as yet not ready to assess.

It is this proclivity to exclusivity that constitutes the second aspect of the disengagement between legal theorists, that can be traced to Austin. Mention has already been made in Sect. 2.2 of the general exclusivity of analytical jurisprudence. This has reached positions in terms of philosophical elevation (encountered in Sect. 2.4) and positions involving a narrowing of the general jurisprudential agenda away from matters of practical and political concern, which would have been quite alien to Austin and Bentham,<sup>100</sup> but are wholly understandable as an extension of the exclusivity in determining the subject matter of jurisprudence that Austin bequeathed to his successors.

<sup>100</sup> For arguments that the nature of the earlier positivists' work has been narrowly interpreted, so impoverishing legal positivism, see Oren Ben-Dor, *Constitutional Limits and the Public Sphere: A Critical Study of Bentham's Constitutionalism* (Oxford: Hart, 2000); David Dyzenhaus, "Positivism's Stagnant Research Programme" (2000) 20 *O.J.L.S.* 703; William Twining, *Globalisation and Legal Theory* (London: Butterworths, 2000) at 16–20, 94–98.



So deep set is this problem within jurisprudence that attempts to alleviate it, such as Stone's effort to add sociological and normative branches to the analytical branch of jurisprudence, considered in Sect. 2.2, only serve to sustain the underlying exclusivity. The idea that there should somehow be a link between analytical and sociological jurisprudence is a matter for contemporary puzzlement rather than resolution,<sup>101</sup> and the analytical-normative relationship is almost invariably hostile.<sup>102</sup> Unsurprisingly so, if the separation into exclusive approaches was from the start wholly artificial.

The exclusivity and disengagement does not bite only at the level of general approaches to jurisprudence. Individual theorists appear burdened with taking exclusive control of the subject matter of jurisprudence by redetermining the province of jurisprudence, by analysing *the* concept of law, by providing the definitive statement of what law *is*, instead of offering theoretical insights that are open to engaging with further insights to contribute to a fuller understanding of law.

Often the frailty of the endeavour which rests a restrictive understanding of law on a single insight is obvious to everyone except the theorist and loyal supporters. The multiplication of this scenario, sadly, does not undermine the credibility of the endeavour. Instead, each faction persists in the atavistic quest for complete control of the subject matter of jurisprudence. They heap scorn on their rivals to the point of ignoring what value their rival's insights might possess. They shore up their own preferred model with abstruse refinements to protect it from attack, but by so doing distort the very insight they seek to preserve and render it incapable of the illumination it originally shed. Few legal theorists will fail to recognise the process described. A number have committed a similar analysis to print. The tendency, however, is to acknowledge it only so far as it affects one's rivals.

The resultant picture of mutual academic disengagement, from both aspects of Austin's legacy, spills over easily into disengagement from other potential stakeholders in legal theory. Fierce hostility over the basis on which legal reasoning can even be admitted as part of the subject matter of jurisprudence, coupled with abstruse and distorted theoretical insights turned in against each other rather than outwards towards issues of practical concern, does not present a friendly interface to stimulate the engagement of those whose priorities are less theoretical.

Yet if this is Austin's legacy, it certainly was not his will. The two aspects of disengagement in his bequest, that have been charted here, ignore the doubts that Austin also left to us. These doubts unquestionably spoke to a more integrated view of legal theory, embracing "the ties" between law as it is and law as it ought to be,

<sup>101</sup> The puzzle has been raised in particular over Hart's purported affiliations with both descriptive sociology and analytical philosophy, see Lacey, *A Life of H. L. A. Hart*, *supra* note 45, and also her "Analytical Jurisprudence Versus Descriptive Sociology Revisited" (2006) 84 *Texas Law Review* 945; William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge: Cambridge University Press, 2009) ch. 2.

<sup>102</sup> A notable exception is John Finnis' insistence that some sort of synthesis between the analytical and normative is required in any adequate theory of law in his *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980). However, his remarks remain allusive and undeveloped.



795 within "a perfect exposition of the science [of jurisprudence] in all its manifold parts."  
796 Austin was also adamant about the fundamental importance of linking theoretical  
797 inquiry to practical concerns:

798 This is the main, though not the only use of *theory*: which ignorant and weak people are in  
799 a habit of *opposing* to practice, but which is essential to practice guided by experience and  
800 observation. (...) Unless the terms of a theory can be resolved into particular truths, the  
801 theory is mere jargon: a coil of those senseless abstractions which often ensnare the  
802 *instructed*; and in which the wits of the ignorant are certainly caught and entangled.<sup>103</sup>

803 Moving contemporary legal theory from a condition I have argued is inherited  
804 from Austin, requires us to pay greater attention to what Austin did leave us.  
805 Although it may be impossible to imagine how the founding of jurisprudence would  
806 have differed had Austin himself resolved his doubts and had the opportunity to  
807 respond to his wider vision for the science of jurisprudence, his further prompts still  
808 have the potential to assist in reshaping legal theory today, 150 years after his death.  
809 There is, furthermore, at the present time an impetus from the changing practical  
810 condition of law. The questioning of established insight is unavoidable in the face of  
811 novel forms of legal phenomena in the global context; and the complexity found  
812 there will test even more severely efforts to narrow the field of inquiry in pursuit of  
813 a solitary insight. Likewise, the insufficiency of legal materials to dispose of all  
814 cases requiring legal intervention in the global context renders legal reasoning an  
815 indispensable part of the subject matter.<sup>104</sup> The historical moment for a fully engaged  
816 legal theory is upon us.

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821 thereafter. This chapter was previously published in (2011) 70 *Cambridge Law Journal* 175 and is  
822 reproduced by the kind permission of Cambridge University Press.

<sup>103</sup> Austin, *The Province*, *supra* note 5 at 49–50 [50–51]. To avoid the risk of the following words of Austin being transformed into another "ambitious insight," it should be stressed that such insight that they contain needs to engage with further insights, notably relating to the matters that are importantly raised in Bix, "John Austin and Constructing Theories of Law" *supra* note 16. The critical issue to explore is how a lack of fit between theory and practice is used to shed light on practice as it is, on practice as it might be, or on other concerns related to but not affecting that practice as it is currently experienced or conceived (very loosely: descriptive theory, normative theory, and blue sky theory). Raising and answering the question would indicate some advance. Evaluating the answers might alleviate Austin's anxiety, or exacerbate it.

<sup>104</sup> See *Theorising the Global Legal Order* ed. by Andrew Halpin and Volker Roeben (Oxford: Hart, 2009), chs. 1 and 14; and, more widely, Twining, *General Jurisprudence*, *supra* note 101; Jack Goldsmith and Daryl Levinson, "Law for States: International Law, Constitutional Law, Public Law" (2009) 122 *Harvard Law Review* 1791.

## Chapter 3

# “Darkening the Fair Face of Roman Law”: Austin and Roman Law

Andrew Lewis

### 3.1 Introduction

Anyone – and perhaps in this context that should be everyone – who has taken the trouble to read past the *Province of Jurisprudence Determined* into the *Lectures on Jurisprudence* will have been struck by the prominence of Roman law in Austin’s material. In effect, Common law and Roman law are together regarded by him as constituting the essence of developed legal thinking. In the eyes of a modern reader, conversant perhaps with the former but not the latter, the appearance of Roman law in Austin will be seen as one further feature which firmly locates Austin in a bygone age and such is the spirit in which the study of John Austin’s work is generally approached nowadays I do not doubt but that my title raises expectations that I am to show the extent to which our author has yet again failed to attain the standard expected of a competent jurist and has managed to disfigure Roman law as he is taken to have misunderstood and mangled Bentham.

But my title is actually a quotation from Austin himself. Austin’s approach to Roman law, as we shall see, is both unusual and subtle. In particular he firmly and clearly distinguishes between the civil law tradition of much European law and the Roman law original which influenced it. The phrase “darkening the fair face of Roman law” is one he uses to take to task one of the prominent later civilian jurists, Heineccius, from whose works Austin himself seems to have first learned the subject, for his failure to preserve the prestign purity of classical Roman law.

To be sure any reader of Austin’s *On the Uses of Jurisprudence* will have encountered his spirited defence of the value of Roman law and his comparison of it to the endeavours of later ages: *e.g.* “Its merits are appropriate and in perfect taste. It bears the same relation to that of Blackstone and Gravina, which a Grecian statue bears to a milliner’s doll in the finery of the season.”

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30 As an example from the *Lectures* of what appears to a romanist Austin's own  
31 perfect taste one might pick almost at random the following passage on the topic of  
32 Judicial legislation in Lecture XXIX. Having considered and rejected what he calls  
33 Mr Bentham's "pithy and homely" phrase "judge-made law" Austin goes on: "judges  
34 legislating avowedly in the manner of the Roman Praetors might do the business  
35 better than any of the sovereign Legislatures which have yet existed in the world."<sup>1</sup>

### 36 3.2 Austin's Knowledge of Roman Law

37 When the Council, the then governing body of UCL as the self-proclaimed  
38 University of London, announced that they intended to fulfil the original intentions  
39 of the founders and advertise a chair in Roman law, Austin wrote to Coates, the  
40 College Secretary, to intimate that he had always understood that his chair of  
41 Jurisprudence encompassed the study of Roman law and that he supposed that he  
42 might continue to teach it. As we have noted this comes as no surprise to the reader  
43 of the *Lectures*. A significant part of Austin's material is devoted to an exposition of  
44 the basic structure and features of the Roman system. Austin neither presumes that  
45 his audience will have much prior knowledge of the Roman system nor leaves a  
46 great deal to be accomplished towards gaining a fundamental understanding of it.  
47 Had Thomas Jefferson Hogg, by his own account the leading candidate for the chair  
48 of Roman law, been appointed, there would have been a struggle. As it was no  
49 appointment was in the end made and the frustrated Hogg was left to publish his  
50 already prepared but undeliverable inaugural lecture.

51 Austin seems also to have regarded International law as falling within his remit.  
52 In large measure this probably arose from the fact that the College's original intention  
53 had been to found four law chairs in English Law, Roman law, International law and  
54 Jurisprudence but in the end only proceeded initially to fill the first and last of these.  
55 Rightly judging that his colleague in the chair of English law, Andrew Amos, would  
56 not be covering either of the other two topics Austin seems simply to have arrogated  
57 them within his own sphere of responsibility. Whatever the proper sphere of his  
58 teaching responsibilities the evidence from the published text of the *Lectures* is that  
59 Austin possessed and utilised a deep acquaintance with Roman law.

60 Where had Austin learned his Roman law? There was a formal curriculum in  
61 Roman law at both Oxford and Cambridge which was followed by those intending  
62 to qualify at Doctors' Commons for practice in the civil law and ecclesiastical  
63 courts. But Austin had not attended university either before entering the army in  
64 1807 or after his discharge in 1812. From 1814 to 1818 he was preparing himself for

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<sup>1</sup> John Austin, *Lectures on Jurisprudence, or The Philosophy of Positive Law* ed. by Robert Campbell (4th edition, rev., London: John Murray, 1873) [Bristol: Thoemmes Press reprint, 2002, two vols.], Lecture XXIX, 533.



practice at the bar. Before the introduction of the Bar examinations after 1846 there was no formal requirement for a bar student to learn Roman law: pupil barristers merely read what their pupil master required. Roman learning was sufficiently displayed in the reported decisions of the courts for an acquaintance with its principles to be considered a useful accomplishment. It is true that Austin was a close associate of Bentham's in the period when he was attempting to start a practice at the bar but Bentham's knowledge of Roman law was rather rudimentary and essentially historical in nature. Austin's own Roman law was, however, as we shall see, substantial and analytical.

During his 6 month period of study in Germany in the winter of 1827–1828 prior to taking up his chair Austin studied with a pupil of Savigny and the list of books he brought back with him and annotated includes several standard German civil law volumes, references to which are to be found in the printed *Lectures*. Despite the carping comment of Crabbe Robinson to the effect that Austin (unlike his wife Sarah) knew no German, he contrived to make good use of his time there. He seems to have attended lectures but also to have studied privately with a pupil of Savigny: this was of course the standard mode of study in German universities at the time but it was peculiarly appropriate to one of some maturity and perhaps limited ability in the German language. (Sarah Austin, whose competence in German extended to the publication of translations of several works including notoriously the travelogue of Prince Pückler-Musgau, never comments on her husband's familiarity with German except to state in the preface to the *Lectures* that in the spring of 1828 he left Germany a "master of the German language" which might or might not substantiate Crabbe Robinson's remark.)

Nevertheless it must be doubted whether this period of study abroad would alone have been sufficient to enable him to display the knowledge of both ancient Roman and German civil law demonstrated in the written *Lectures*. Although the matter has yet to be thoroughly elucidated it appears that Austin made few changes to the text of the lectures from his first writing of them. The printed *Lectures*, albeit supplemented with students' notes, principally those taken by John Stuart Mill at their first delivery, do display small corrections and modifications of earlier matter the author made on subsequent occasions. This is of course a familiar phenomenon to those who have ever reused their lecture notes. It is now difficult to tell what Austin did on the occasion of subsequent delivery, in those places where the text explicitly corrects errors in earlier lectures, as for example in Lecture XXII: "I said in a former lecture, that an obligation to *will* is impossible. Why I said so, I am somewhat at a loss to see."<sup>2</sup>

Moreover we have unimpeachable evidence that Austin was sufficiently acquainted with Roman law in 1821–1822 to teach it, alongside Blackstone, to the 17-year-old John Stuart Mill. This was at a time when Austin's career as a barrister seems to have failed before it had properly begun. The Austins and the Mills were both close neighbours of Bentham in Queen Square Place. James Mill had taught his

<sup>2</sup> Austin, *Lecture XXII*, *supra* note 1 at 404, fn 51. Oddly the objectionable sentence is not itself preserved except in John Stuart Mill's notes: *cf.* at 461, fn 90.

106 formidably precocious son at home but himself lacked those legal elements which  
107 he, probably under Bentham's influence, regarded as prerequisite. Quite probably it  
108 was Bentham who suggested Austin as a tutor.

109 We know what Mill and Austin read together from Mill's account of the episode  
110 in his *Autobiography*: "with Mr Austin I read Heineccius on the Institutes, his  
111 Roman Antiquities and part of his exposition of the Pandects, to which was added a  
112 considerable portion of Blackstone."<sup>3</sup> This was by no means an unusual undertaking  
113 at the time: Sir Walter Scott recalled in his memoirs how with a fellow student "in  
114 the course of two summers, we went, by way of question and answer, through the  
115 whole of Heineccius' Analysis of the Institutes and Pandects."<sup>4</sup> Scott and his friend  
116 probably used the translation of the Heineccius published in Edinburgh in 1780.<sup>5</sup>  
117 But Austin and Mill almost certainly read from the original Latin which Austin  
118 himself occasionally quotes extensively in the *Lectures*.<sup>6</sup>

119 Austin's library was bequeathed by his widow to the Inner Temple where it was  
120 largely destroyed during the Second World War but the catalogue published by  
121 Robert Campbell in his *Advertisement* to his editions of the *Lectures* reveals that it  
122 contained a copy of Heineccius' *Recitationes in elementa Juris civilis secundum*  
123 *ordinem Institutionum*<sup>7</sup> and the 1822 edition by Haubold of Heineccius *Antiquitatum*  
124 *Romanarum Jurisprudentiam illustrantium syntagma*.<sup>8</sup> The latter is undoubtedly the  
125 text referred to by Mill as *Roman Antiquities*, and which, it is worth noting, was  
126 frequently cited by Bentham. "Heineccius on the Institutes" is the *Recitationes* also  
127 known as the *Elementa Iuris Civilis* which is a section by section discussion of  
128 Justinian's Institutes. Mill's surviving library, now at Somerville College, Oxford,  
129 contains his copy of Heineccius' *Elements of the Institutes*. Mill's "exposition of the  
130 Pandects" is almost certainly the less well known *Elementa Iuris civilis secundum*  
131 *ordinem Pandectarum* first published in 1740, of which, however, neither Austin's  
132 nor Mill's library preserved a copy.

133 A considerable surprise is that Austin also possessed an 1823 copy of Goeschen's  
134 edition of the *Institutes of Gaius*. To appreciate the significance of this we must  
135 make a short excursus into our sources of knowledge of Roman law. Roman law  
136 was a living system from the middle of the fifth century BC until the middle of  
137 the fifth century of our era. In the 500's AD it underwent a process of codification

<sup>3</sup> John Stuart Mill, *Autobiography*, in *Collected Works* ed. by John M. Robson and Jack Stillinger (London: Routledge and Kegan Paul, 1981) Vol. 1, 69, cf. 77, 79.

<sup>4</sup> John Gibson Lockhart, *Memoirs of the Life of Sir Walter Scott*, Volume I (Edinburgh: Cadell, 1837) at 83.

<sup>5</sup> See P. Stein, "Actio de effusis vel dejectis and the concept of quasi-delict in Scots Law" 4 *International and Comparative Law Quarterly* (1955) at 374.

<sup>6</sup> E.g. Austin, *Lecture XIV*, *supra* note 1 at 386.

<sup>7</sup> Johann Gottlieb Heineccius, *Recitationes in elementa juris civilis secundum ordinem institutionum* (Vratislaviae: Impensis Io. Friderici Kornii, 1789).

<sup>8</sup> Johann Gottlieb Heineccius, *Antiquitatum Romanarum Jurisprudentiam illustrantium syntagma* ed. by Christ. Gottl. Haubold (Frankfurt a.M.: Sumptibus H.L. Broenneri, 1822).



which in effect brought 1,000 years of legal development to an end (though this was not the intention of its codifiers). Our major sources of earlier Roman law come in the form of these codified and edited texts of earlier legislation and legal writings published by the emperor Justinian around 530 AD, together with a contemporary introductory text attributed to the emperor himself, Justinian's *Institutes*. For 1,500 years, Justinian's *Institutes* and commentaries upon them, like Heinemann's, have been the starting point of a student's learning in Roman law.

Romanists have always been drawn between the competing needs of scholarship and practice, between understanding the true meaning of their ancient sources and providing a contemporary significance for this understanding. The texts preserved by Justinian's codification were the basis of legal practice in early modern Europe. But from the sixteenth century onwards they were also the means for recovering the historical roots of the Roman system in the period of the late Republic and early Empire which, it was generally agreed, was the most interesting dynamic and classical period of Roman law. Although legal writings from this period were transmitted as part of Justinian's legacy, they were preserved in a bowdlerised and edited form.

In 1819 the world of Roman legal history was transformed by the publication of a text, the *Institutes of Gaius*, more or less complete and in its original form as it was written in the second century AD. It had been found in the cathedral library at Verona by Neibuhr, a pupil of Savigny. Goeschen published an edition in 1820. Austin acquired a copy of the 1823 reprint, and according to Campbell's list of his books it was "full of analytical notes." The bulk of Austin's Roman law, as his German law library was obtained during his stay in Bonn in 1827, but it seems possible that, stimulated by his reading with John Stuart Mill, he began a deeper study during the period before his appointment to the UCL chair. It is perhaps relevant that in 1824 a much improved edition of Gaius' text was issued by Goeschen incorporating Bluhme's readings. Had Austin acquired his Gaius in 1827 it would likely have been the 1824 edition. As it is his library contains the earlier one and probably from an earlier time.

### 3.3 Austin's Use of Roman Law

In his lectures Austin was not teaching Roman law. Had he done so he would undoubtedly have followed the text of Gaius and Justinian's *Institutes* which move from a brief exposition of the sources of law through the law of persons to the law of property, including both inheritance and obligations, before finishing with the law of procedure or actions.

Austin's scheme is naturally more analytic. He starts in Lecture XII with an analysis of pervading notions dealing successively with Right, Person, Thing, and Acts and Forbearances. He then proceeds from Lecture XVIII onwards to an examination of Will, Motive, Intention and Negligence before concluding with Sanction.

In all this Austin's starting point is not Roman law, neither is it, of course, Common law but rather the positive scheme of express or tacit commands of a sovereign to

179 which he occasionally refers. His Roman law references therefore are in the form of  
180 secondary illustrations rather than primary proofs. He would no more have found a  
181 demonstration of positivism in the writings of the Roman jurists than in the judge-  
182 ments of English judges. The first appearance of Roman learning occurs in lecture  
183 XII where Austin is considering the meaning of the term Person. Modern civilians,  
184 he says, use the term "person" to refer to someone with legal rights, from which it  
185 is a simple step to construct fictitious persons out of entities which have such rights.  
186 But the classical Roman jurists used "person" principally to mean physical or  
187 natural persons and included within the compass of the term those, like slaves, who  
188 expressly had no rights. The jurists also used person in a secondary sense to mean  
189 status, as when they characterised an individual person as having several *personae*:  
190 as a human might be a citizen, a son and a father. Austin shows that the modern use,  
191 limiting person to the second of these meanings, arises from a confusion between  
192 the notion of *status* and *caput*, the use of which is distinct in the Roman sources but  
193 confused in modern analysis. In particular he shows that the proper translation of  
194 *jus personarum* is not *law of persons* as in Hale and Blackstone but *law of status*;  
195 *personarum* here being used in its secondary meaning. In demonstration of this he  
196 points to the sixth century Greek paraphrase of Justinian's *Institutes* by Theophilus  
197 which translates the phrase as "division of statuses." Austin claims in Lecture XIII  
198 with some plausibility that this confusion has further led to the mistaken idea that  
199 *ius in rem* has something to do with things as opposed to persons: whereas it really  
200 means rights applying generally.<sup>9</sup> Austin uses the authority of the Roman jurists as  
201 a basis for his own broad use of the term person.

202 Austin's exposition of Roman law frequently makes use of the *Institutes of Gaius*  
203 which preserve details of the earlier classical law which were removed from the  
204 texts transmitted in Justinian's codification and which had, therefore, had only very  
205 recently come to notice following Niehbur's discovery. For example in dealing with  
206 rights *in rem* in Lecture XV, Austin refers to the form of conveyance known as  
207 *mancipatio*, details of which are contained exclusively in Gaius as the institution  
208 had dropped out of use by Justinian's time and references to it were accordingly  
209 deleted from the sources he uses.

210 Beyond the characteristic definition of terms which occupies Lectures XII-XXVIII  
211 Austin proceeds to give his main discussion three main divisions: Law in relation to  
212 its Sources; The Law of Things; and the Law of Persons. This threefold division is  
213 directly taken from the Roman Institutional model – that is, the pattern of exposition  
214 taken by Gaius in his *Institutes* and followed by Justinian in what is in effect a revised  
215 version of Gaius' text. In the Roman model the matter of sources is disposed of in a  
216 few opening sentences in the nature of an introduction. The main Roman divisions  
217 are the Law of Things, the Law of Persons and the Law of Procedure. Already in  
218 Justinian's *Institutes*, the law of procedure is very truncated, reflecting a major change  
219 consequent upon the development of state-sponsored adjudication. (Adjudication in  
220 early Roman law is more akin to arbitration than our court system.) There is no great

<sup>9</sup> Austin, *Lectures XIII*, *supra* note 1 at 374.



surprise that Austin found no room for a discussion of Roman procedure save in the form of an extended analysis of the nature of judicial legislation which forms part of the law of sources.

However, although Austin follows the remaining Roman divisions into the Law of Persons and the Law of Things he inverts the Roman order. For Gaius the law of status precedes the law of things because it is a means of clearing out of the way all those natural persons who lack full capacity, those Roman citizens of full age and capacity for whom the law of things exists. It is a striking feature of the Roman scheme that the nature of full capacity is expounded negatively by determining all those who lack it and positively only by an expositions of the rights themselves in the Law of Things. Austin rightly complains that the Gaian scheme poses difficulties of exposition. To comprehend the nature of the divisions of status it is necessary to refer to some aspects of the law of things. A striking example, which continues to present difficulties to this day to Roman law students following the Gaian scheme, is the inclusion within the analysis of the law of family status of the mode of conveyance known as *mancipatio*. A detailed knowledge of this feature of the Roman law of property is critical to an understanding both of how Romans freed the subordinate members of their family from the burden of *patria potestas* (so that they might become independent citizens in their own right) and, more importantly in practice, how subordinates of one family might be adopted into another. I am not the only modern Romanist to sometimes treat the law of things, including modes of conveyance, before the law of persons in my undergraduate class, precisely to overcome this difficulty.

There is a further consideration which, I suspect weighed with Austin who was not after all primarily expounding the Roman law but giving a general analysis of principles which he considered universal, at least for developed European legal systems. As we have noted, one of the justifications for the Roman order is the need to clear out of the way the considerable number of individuals whose status excludes them from the benefits of the law of things. Chief among these were slaves, but the list includes also all children (of whatever age) whose fathers are still alive, women married in traditional form (*in manu*) and also all women whose fathers were dead but who had not by various means escaped the requirement of having a perpetual legal guardian. The list also included, in some respects, freedmen (*i.e.* former slaves manumitted by their masters). This is a considerable number of individuals and emphasises the extent to which full Roman legal status was restricted to a limited class of (mainly) elderly men. By contrast in most modern systems, even in Austin's day, the numbers of those with full civic status were considerably greater and the arguments for dealing with the central case of those with full rights first and the exceptions thereafter, shifts accordingly.

The state in which Austin's lectures have come down to us has, however, mutilated his conception of the relationship between Status and Property, Persons and Things. It is clear from the scheme set out in the *Outline of the Course of Lectures* that Austin intended to conclude his Lectures with the Law of Persons. It is worth remarking that although Austin set out to deliver his course on five separate occasions (aside from his lectures at the Inns of Court) he seems never to have completed

266 them as he intended. Certainly the remaining published matter breaks off, at lecture  
267 LVII, in the early stages of the exposition of the Law of Things which begins in  
268 lecture XLV.

269 The unfinished nature of the project is unfortunate as it leaves as Austin's only  
270 treatment of the law of persons or status the material in lectures XL-XLVIII, which  
271 he regarded as merely preliminary matter. To the casual observer it might seem,  
272 therefore, that Austin had simply followed the Roman pattern of putting Persons  
273 before Property, whereas he very firmly intended the opposite. I regard this as  
274 important not as indicating any fundamental criticism by Austin of the Roman  
275 institutional scheme derived from Gaius but rather as indicating the extent to which  
276 he had so immersed himself in the Roman material as to feel confident to present  
277 it in a new pattern, one which was more in keeping with its continued relevance to  
278 modern legal analysis.

279 Austin held a robust view of the respective merits of the classical Roman lawyers  
280 who had formed the material of Roman law and their successors who had attempted  
281 to collect, collate and interpret their remains. His most supportive remarks are  
282 reserved for the lawyers of the first age of rediscovery of Roman law in Europe, the  
283 Glossators and Commentators. In this he was but following Savigny though it was  
284 far from the contemporary wisdom. In Europe for the most part the effect of the  
285 Humanist revolution in scholarship, not to speak of the Enlightenment, was to  
286 consign the glossator Accursius and his followers to the dungeon of the middle  
287 ages. In England they were scarcely known at all. For Austin they represented a  
288 purity of grasp and understanding of the Roman texts which few of their successors  
289 could match. Indeed few of the early modern exponents of Roman civil law escape  
290 Austin's censure. His greatest scorn, following Savigny, is reserved for the compilers  
291 of the French *Code civil* (and we see here perhaps an echo of that anti-French  
292 sentiment perhaps to be expected of one who was under arms against Napoleon).  
293 He attributes to them: "ignorance of, combined with servile respect for, Roman  
294 law."<sup>10</sup> But even Grotius is damned with faint praise as when his definitions of  
295 *jura in rem* and *in personam* are quoted: "this definition also, like the former, was,  
296 I believe devised by Grotius: in neither of them is there any great merit."<sup>11</sup> Heineccius,  
297 to whom as we have seen Austin was indebted for some of his earliest reading in the  
298 subject, was nevertheless taken to task for "darkening the fair face of Roman law"<sup>12</sup>  
299 by conflating the right to acquire something with the property right in something –  
300 in Latin confusing the *jus ad rem* with *jus in rem*, or in more modern terms conflating  
301 the contractual right to acquire with the property right when acquired.

302 Austin is not afraid to extend his criticism to the Romans themselves. In the  
303 fragmentary material on obligations which follows lecture LVII (and which the  
304 editor Robert Campbell seems at one stage to have referred to as "Lecture LVIII")

<sup>10</sup> Austin, *Lectures*, *supra* note 1 at 1071.

<sup>11</sup> Austin, *Lecture XIV*, *supra* note 1 at 381.

<sup>12</sup> Austin, *Lecture LVII*, *supra* note 1 at 995.



in footnote 7 at page 52) there is a section on quasi-contracts and quasi-delicts. 305  
These categories, we now see clearly, were invented by Justinian and form no part 306  
of Gaius' institutional discussion. Austin saw this much: "Gaius makes no distinction 307  
between delicts and quasi-delicts, though he adverts to quasi-contracts." In fact 308  
Austin is mistaken in this criticism. Gaius does use the phrase "quasi ex contractu" 309  
in a discussion of the liability of one who has been handed a payment mistakenly to 310  
reimburse the donor. Unlike a genuine loan there is no contract, but Gaius says he 311  
should repay as though there were a contract. But it is Justinian's compilers who 312  
seek to make this a substantial category of obligation, quasi-contract, and then 313  
invent quasi-delict to keep it company. But Austin is fiercely critical: "the distinction 314  
between quasi-contract and quasi-delict seems to be useless."<sup>13</sup> 315

### 3.4 Conclusion

316

I have shown that Austin's grasp and interest in Roman law was considerable, going 317  
beyond what might have been found elsewhere in England at the time. His ideas 318  
about law are illustrated as much by Roman as English example. He is not afraid to 319  
engage with his authorities, whether modern or ancient and demonstrates a clear 320  
appreciation of the merits of the traditional Roman analysis whilst remaining free to 321  
advance beyond it. It is the greatest of pities that he never concluded his mature 322  
work. 323

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<sup>13</sup> *Ibid.* at 945.